

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1994

OPINION NO. 94-01 ADMINISTRATIVE LAW; FEES: State Emergency Response Commission fees contain no aggregate cap.

Carson City, February 16, 1994

Mr. Ron Hill, Co-Chairperson, Emergency Response Commission, 555 Wright Way, Carson City, Nevada 89711

Dear Mr. Hill:

This is in response to your request for an opinion from this office concerning the following inquiry:

QUESTION

What is the total amount of State Emergency Response Commission (SERC) fees that may be collected from each facility falling under SERC's jurisdiction?

ANALYSIS

A. Background

In 1986, Congress passed the Emergency Planning and Community Right to Know Act (EPCRA). This legislation mandated creation of state emergency response commissions to coordinate and oversee in-state compliance with certain planning, reporting and notification requirements regarding hazardous materials and toxic chemicals. 42 U.S.C. §§ 11001—11050 (1986).

In accordance with this mandate, SERC was formally established under Nevada law "for the purpose of carrying out the provisions of Public Law 99-499 [EPCRA] and other matters relating thereto." [NRS 459.738](#)(1). Pursuant to this legislative direction, SERC is statutorily authorized to assess and collect fees from the following three categories of persons:

1. Those required to submit toxic chemical release forms under section 313 of Public Law 99-499 (EPCRA) (*see* [NRS 459.746](#));
2. Those who store extremely hazardous material within the thresholds set forth within 40 C.F.R., Part 355<sup>1</sup> (*see* [NRS 459.744](#)(2); [NAC 459.9917](#)); and
3. Those who manufacture for transport an extremely hazardous material within the same thresholds set forth within 40 C.F.R., Part 355 (*see* [NRS 459.744](#)(3); [NAC 459.9918](#)).

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<sup>1</sup> This federal rule consists of a list of extremely hazardous substances and the threshold amounts that trigger necessary reporting under section 302 of Public Law 99-499.

Under [NRS 459.744](#), these fees are to be established by regulation, and are assessed to cover SERC's "services and regulatory activities." [NRS 459.744](#)(1). Such schedule of fees "must be set at an amount which approximates the cost to [SERC] of performing those services and activities." *Id.*

It is our understanding that your inquiry here stems from SERC's intent that no facility should have to pay more than \$5,000 per year as to all applicable SERC fees, and its administrative understanding that such an aggregate \$5,000 fee cap currently exists. To answer your inquiry, SERC's fee statutes must be analyzed based on established rules of statutory construction.

#### B. Statutory Construction

Under traditional legal principles, if the language of a statute is clear and unambiguous, there is no room for a different statutory construction. *Nevada Power Co. v. Public Service Commission*, [102 Nev. 1](#), 4, 711 P.2d 867, 869 (1986). As plainly stated by the Nevada Supreme Court: "Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent." *McKay v. Board of Supervisors*, [102 Nev. 644](#), 648, 730 P.2d 438, 441 (1986). The specific fee cap language within the three SERC fee provisions must thus be analyzed.

[NRS 459.744](#)(2) authorizes SERC to establish by regulation:

*A fee, not to exceed \$5,000 per year, to be paid by each person who stores an extremely hazardous material in an amount greater than the threshold planning quantity established for such material in Appendix A or B of Part 355 of Title 40 of the Code of Federal Regulations. [Emphasis added].*

Under the applicable administrative regulation adopted by SERC, this filing fee is set at \$100, and an additional surcharge fee of \$100 per ton (for storage in excess of one ton) is assessed. [NAC 459.9917](#). The regulation concludes that "[a] person may not be required to pay more than \$5,000 annually pursuant to this section." [NAC 459.9917](#)(3) (emphasis added).

Section 459.744(3) authorizes SERC to establish by regulation:

*A fee, not to exceed \$2,000 per year, to be paid by each person who manufactures for transport an extremely hazardous material in an amount greater than the threshold planning quantity established for such material in Appendix A or B of Part 355 of Title 40 of the Code of Federal Regulations. [Emphasis added].*

Under the applicable administrative regulation, this filing fee is set at \$100, and an additional surcharge fee of \$100 is assessed for each ton of material which is manufactured for transport. [NAC 459.9918](#). The regulation concludes that "[a] person may not be required to pay more than \$2,000 annually pursuant to this section." [NAC 459.9918](#)(3) (emphasis added).

Finally, [NRS 459.746](#) states that:

*A reporting fee of \$500 must be paid to the commission by all persons who are required to submit a toxic chemical release form pursuant to Public Law 99-499, except that a person must not be required to pay more than \$5,000 in reporting fees in any calendar year. [Emphasis added].*

This statute has no accompanying administrative regulation, and certain other distinguishing characteristics apply. Unlike the previous two regulations set forth above, [NRS 459.746](#) refers to a maximum "reporting" fee as compared to a "filing" fee within [NRS 459.744](#). Further, [NRS](#)

[459.746](#) applies to toxic chemicals; the fees within [NRS 459.744](#) apply to "extremely hazardous materials."

In sum, the aforementioned statutes each plainly state three separate fee "cap" levels for the three wholly different fees assessed by SERC: a yearly maximum of \$5,000 for persons that store extremely hazardous material; a yearly maximum of \$2,000 for persons that manufacture extremely hazardous material for transport; and, a yearly maximum of \$5,000 for toxic chemical release reporting. Such caps, if taken together, could mean that a facility that falls under all three categories (i.e., one that stores *and* manufactures for transport extremely hazardous materials, and also releases toxic materials into the environment) could accumulate total SERC fees of up to \$12,000 per year.

Further, it is clear that no aggregate cap exists within the applicable administrative regulations. Instead, as noted above, the two regulations specifically include language (i.e., "pursuant to this section") reiterating separate caps of \$5,000 and \$2,000 per year. See [NAC 459.9917](#) and [459.9918](#). In short, because no language creating a \$5,000 aggregate cap exists within SERC's statutory and administrative scheme, it can be argued that none should be implied. It is clear that an aggregate cap could have easily been included in the statutory scheme by the legislature, or included within the administrative regulations later adopted by SERC pursuant to the fee statutes. See *State, Dep't of Motor Vehicles v. Brown*, [104 Nev. 524](#), 526, 762 P.2d 882, 883 (1988).

It has been SERC's position that no facility should have to pay more than \$5,000 per year as to all SERC fees, and that such \$5,000 cap was "inadvertently" omitted from the laws as passed by the legislature. This office has reviewed the legislative history of Senate Bill 462 (which formally created SERC and authorized its various fees), and finds that there was one brief reference to SERC fee caps made during testimony before the Assembly Committee on Natural Resources, Agriculture and Mining. See Minutes of June 12, 1991, hearing on S.B. 462 before the Assembly Committee on Natural Resources, Agriculture and Mining at 7-8. Despite this reference, no aggregate fee cap for SERC fees was ever established by the legislature.

Thus, in that no aggregate cap exists within (or is supported by) the current statutes and regulations, it is appropriate to address how SERC may properly set the aggregate cap it has long intended to apply. This office has been informed that a \$5,000 cap has been "administratively set" by SERC; however, a review of recent SERC meeting minutes does not clarify how or when this "administrative setting" was attempted. In any case, such setting would be considered "ad hoc" rule-making in violation of Nevada's Administrative Procedure Act, because the formal requisites for promulgation of regulations were not met. See [NRS 233B.038](#), *et seq.*; *Coury v. Wittlessea-Bell Luxury Limousine*, [102 Nev. 302](#), 305, 721 P.2d 375, 377 (1986). We must now address the appropriate vehicle for setting a fee cap.

### C. Administrative Authority to Set Fee Cap

As an administrative agency created by the Nevada Legislature, the scope and extent of SERC's authority to act is contained within, and limited by, its own statutes. In short, SERC has only those powers which have been expressly or impliedly granted by law. *Andrews v. State, Board of Cosmetology*, [86 Nev. 207](#), 208, 467 P.2d 96-97 (1970).

As discussed earlier, SERC "shall establish by regulation . . . [a] schedule of fees for its services and regulatory activities." [NRS 459.744](#). See also [NRS 459.740\(1\)](#). This explicit statutory authorization to establish fee regulations, combined with the two fees already set through regulation ([NAC 459.9917](#) and [459.9918](#)), logically supports an implied power to set an aggregate cap for these two fees. However, it is clear that the applicable statute also specifies that the schedule of SERC fees "must be set at an amount which approximates the cost to the commission

of performing [its] services and activities." [NRS 459.744](#)(1). Accordingly, such a cost/service analysis must be completed by SERC before any separate fee cap regulation can be promulgated.

More importantly, "[a]dministrative regulations cannot contradict or conflict with the statute they are intended to implement." *Roberts v. State*, [104 Nev. 33](#), 37, 752 P.2d 221, 223 (1988) (citations omitted). In order to avoid such conflict, appropriate statutory amendment to [NRS 459.744](#)(2) and (3), and [NRS 459.746](#) must be had to remove the different yearly caps set forth therein. Similarly, [NAC 459.9917](#) and .9918 should be amended to delete the current language "pursuant to this section" that refers to the two separate fee caps on these filing fees, before (or at the same time as) an aggregate fee cap regulation is adopted.

If such changes are not made, it could be argued that an aggregate fee cap regulation would not only contradict or conflict with the current statutes, but would also exceed statutory authority if adopted. See *Boulware v. State, Dep't of Human Resources*, [103 Nev. 218](#), 219, 737 P.2d 502 (1987) (a state agency "may not act outside the meaning . . . of the enabling statute"). By way of example, it is noted that the Nevada Supreme Court has invalidated a fee regulation that allowed for multiple fees, when the enabling statute called for only a single fee. *Hager v. Nevada Medical Legal Screening Panel*, [105 Nev. 1](#), 3, 767 P.2d 1346-47 (1989).

### CONCLUSION

In sum, [NRS 459.744](#)(2) and (3) (and accompanying regulations), and [NRS 459.746](#), each plainly establish three separate fee caps for the three different fees SERC is authorized to collect. Therefore, in light of the plain language of the statute, the absence of any language within the statutes or regulations setting an aggregate cap, and the absence of clear legislative intent for such a cap, no aggregate cap can be inferred. Accordingly, fiscal analysis must first be accomplished in order to establish the true cost to the commission of performing its services and activities. Statutory and regulatory amendments and subsequent promulgation of appropriate administrative regulations will be required to properly establish the aggregate cap desired by SERC.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: LISA W. CLAYTON  
Deputy Attorney General

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OPINION NO. 94-02 INSURANCE; ANNUITIES: State and nationally chartered banks and their employees are permitted to be licensed as annuity agents pursuant to chapter 683A of NRS, and are subject to the same statutes and regulations as any other person licensed to sell annuities in the State of Nevada.

Carson City, March 3, 1994

Teresa P. Froncek Rankin, Commissioner of Insurance, Division of Insurance, 1665 Hot Springs Road, No. 152, Carson City, Nevada 89710

Dear Ms. Rankin:

You have requested an opinion regarding the effect of A.B. 756 (1993) on current statutes in Title 57 applicable to agent licensing and unfair trade practices, and whether A.B. 756 is applicable to both state and national banks.

### QUESTION ONE

Does [NRS 683A.260](#), regarding limited licenses, in any way restrict the ability of a bank under [NRS 683A.110\(3\)](#) to sell credit insurance, fixed annuities or variable annuities?

### ANALYSIS

[NRS 683A.260\(1\)\(b\)](#) allows the commissioner of insurance to issue a limited agent's license to an applicant whose insurance activities are limited to the solicitation and sale of credit insurance or fixed annuities. Subsection (2) of this section allows the commissioner to adopt regulations regarding examinations for these limited licenses, and subsection (3) states that a person who holds such a limited license may not concurrently hold any other license authorized by chapter 683A of NRS. The plain meaning of subsection (1)(b) is that an applicant may hold either a credit limited license or a fixed annuities limited license, but not both. However, the fact that the commissioner "may" issue a limited license for credit insurance or fixed annuities does not mean that the only individuals who may sell credit insurance or fixed annuities must have a limited license.

The legislative history of [NRS 683A.260](#) reveals the statute was originally enacted in 1971 to allow a limited agent's license to sell insurance incidental to the transportation industry. *See* Act of May 5, 1971, ch. 660, § 214, 1971 Nev. Stat. 1646. It was amended in 1981 to allow limited licenses for credit insurance and fixed annuities. *See* Act of June 3, 1981, ch. 478, § 1, 1981 Nev. Stat. 929. The legislative history of the amendments reveals that the primary purpose of the statute was to limit solicitations and sales by limited licensees to the object of their licenses, and to allow the commissioner of insurance flexibility regarding examinations and continuing education for limited licensees.<sup>2</sup> Neither the legislative history, statute nor chapter 683A of NRS suggests that the only way to be licensed to sell fixed annuities or credit insurance is through the acquisition of a limited license.

Therefore, if a limited license is issued to an individual pursuant to [NRS 683A.260\(1\)\(b\)](#), that individual is limited to soliciting or selling only credit insurance or fixed annuities and nothing else. However, the commissioner may allow the sale of fixed annuities or credit insurance as part of a broader license which may also allow the sale of other types of annuities or insurance. For example, since you have stated in your letter that a life license is required for the sale of variable annuities, such a license could also include fixed annuities and credit insurance if it is granted

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<sup>2</sup> Former Commissioner Patsy Redmond, in a memorandum dated May 21, 1981, to Assemblyman Robinson, Chairman of the Committee on Commerce, on SB 534, which amended NRS 683A.260 in 1981, stated:

This bill as amended will allow a limited license status for those licensees in the credit life and health, credit property and casualty and fixed annuities only.

This bill will allow the Commissioner to determine need for pre-licensing examinations. We do request that the brackets on line 23, page 2 be taken out as the division does not feel the applicants in credit insurance should be exempt from the possibility of examination.

By allowing limited license status the division can also exempt such licensees from any requirements for continuing education.

subject to any regulations which have been promulgated by the commissioner of insurance. In addition, there is nothing in chapter 683A of NRS prohibiting a license for annuities only.

The new provision of [NRS 683A.110](#), which is subsection (3), permits licensing of banks by the commissioner of insurance to sell annuities, and defines annuities as having the same meaning as that found in [NRS 688A.020](#). The definition of annuity in [NRS 688A.020](#) is a broad definition of annuity which includes both fixed and variable annuities.<sup>3</sup> Therefore, it is clear that the legislature did not intend to limit a bank's ability to sell annuities to either fixed or variable annuities.

### CONCLUSION TO QUESTION ONE

[NRS 683.260](#) does not require that an agent who sells credit insurance or fixed annuities have a limited license. The commissioner of insurance may allow banks and other agents to sell fixed and variable annuities and credit insurance as part of a broader license or a license with greater examination or continuing education requirements than a limited license.

### QUESTION TWO

What licensing requirements may be imposed on banks selling annuities?

### ANALYSIS

A.B. 756 gives the commissioner of insurance the authority to license banks to sell annuities. There is nothing in A.B. 756 which would allow banks any exemption from any current state requirement imposed on any insurance agent to be licensed to sell fixed or variable annuities. Indeed, the legislative history reveals an intent that there be the same requirements imposed upon banks selling annuities as for insurance agents who sell annuities.<sup>4</sup> The commissioner of insurance

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<sup>3</sup> Black's Law Dictionary defines fixed annuity and variable annuity as:

*Fixed Annuity.* Annuity that guarantees fixed payments, either for life or for a specified period to annuitant.

*Variable annuity.* A contract calling for payments to the annuitant in varying amounts depending on the success of the investment policy of the insurance company; unlike a straight annuity which requires the payment of a fixed amount. Purpose of this type of annuity is to offset deflated value of dollar caused by inflation.

*Black's Law Dictionary*, 90 (6th ed. 1990).

NRS 688A.020 reads in pertinent part as follows:

For the purposes of this code an "annuity" is a contract under which obligations are assumed to make periodic payments for a specific term or terms or where the making or continuance of all or some such payments, or the amount of any such payment, is dependent upon continuance of human life, except payments made pursuant to optional modes of settlement under the authority of NRS 681A.040 ("life insurance" defined).

<sup>4</sup> See Minutes of June 28, 1993, Hearing on AB 756 before the Senate Committee on Commerce and Labor at 4-5, where the legislative history discloses that:

Senator Townsend asked whether the license issued to banks to sell annuities would be the same as those issued to insurance agents. Terry Rankin, Commissioner of Insurance, Department of Insurance, State of Nevada, said it is the same license.

Senator Townsend asked whether Ms. Rankin would license the individual and the bank or just the individual if this remained in her jurisdiction. Ms. Rankin explained if the bank were to receive commissions from the sales they would both need to be licensed. Mr.

is given broad latitude in chapter 683A of NRS to prescribe the type of examination required for each type of license, and to delineate the different types of licenses. A requirement is that an applicant take and pass a written examination pursuant to [NRS 683A.170](#), unless the applicant falls within one of the exemptions from the examination requirement contained in [NRS 683A.180](#) or [NRS 683A.190](#). Therefore, the commissioner of insurance may impose the same requirements on banks wishing to sell annuities as are imposed currently on insurance agents who sell annuities.

This conclusion is bolstered by the conclusion in an unpublished Attorney General's Opinion issued on February 19, 1993, which predated the enactment of A.B. 756. That opinion held that although state banks, which do not act as agents for insurance companies, must be allowed to sell annuities if national banks are allowed to under the "parity clause" in the state banking code, *see* [NRS 662.015](#)(1)(f), any bank wishing to sell annuities must still comply with all the annuity sales requirements under Title 57 of NRS, the state Insurance Code. The opinion specifically listed [NRS 683A.030](#), [683A.040](#) and 683A.090 as statutes requiring licensure as an agent or broker prior to the sale of annuities in the State of Nevada.

### CONCLUSION TO QUESTION TWO

The legislative history indicates that the commissioner of insurance may impose the same requirements on banks selling annuities as are imposed on insurance agents who sell annuities.

### QUESTION THREE

Must banks, licensed as agents to sell annuities, comply with [NRS 683A.140](#), which requires that only natural persons who are resident agents be authorized to act for resident agents or brokers, and that only nonresident natural persons be licensed to act for nonresident agents or brokers, or do the provisions of chapter 80 of NRS regarding the authority of foreign corporations to do business in Nevada apply?

### ANALYSIS

To reiterate what has been stated in response to the first two questions, the clear intent of the legislature in enacting A.B. 756 is that banks, desirous of selling annuities, comply with the same state requirements imposed upon any other person in the State of Nevada who desires to sell annuities. All of the requirements in chapter 683A of NRS applicable to insurance agents selling annuities are also applicable to banks selling annuities, including [NRS 683A.140](#). There is nothing within A.B. 756 or the legislative history which establishes a lesser standard for banks to sell annuities than for insurance agents in general.

### CONCLUSION TO QUESTION THREE

Banks must comply with the same requirements as insurance agents generally when selling annuities, including [NRS 683A.140](#), requiring that only natural persons who are residents of Nevada act as agents for resident agents, and only nonresident natural persons act as agents for nonresident agents. Therefore, chapter 80 of NRS is not controlling on this question.

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Walshaw agreed with that assessment.

A review of the entire legislative history produced no evidence that any objection was raised by any committee member to these comments. Further, the legislature, in changing the original bill from regulation by the commissioner of financial institutions to regulation by the commissioner of insurance in the final bill, manifested its intent that the annuities provisions of the Insurance Code be applicable.

## QUESTION FOUR

Do the requirements of chapter 686A of NRS regarding unfair trade practices apply to banks selling annuities? Specifically you ask: (a) may the division of insurance regulate whether a bank employee, who is not licensed as an agent, may receive a "finder's fee" for referring a customer to a licensed annuities agent in the bank; (b) do provisions relating to twisting, misrepresentation and the replacement of policies under chapter 686A of NRS and NAC also apply to banks; (c) are rebates or incentives such as free checking in return for purchasing an annuity prohibited; and (d) do other trade practice standards in Title 57 of NRS and corresponding regulations in NAC also apply, such as regulations related to the replacement of life insurance? See [NAC 686A.510](#) and [686A.570](#), inclusive.

### ANALYSIS

There is nothing within A.B. 756 or the legislative history thereof which would exempt banks from any other statutes or regulations, including the unfair trade practices chapter (686A of NRS), regulating the sale of insurance products and annuities. Any statute or regulation which specifically deals with, has been interpreted to deal with, or may reasonably be interpreted to deal with annuities in chapter 686A of NRS or elsewhere in Title 57, is binding as well on banks which sell annuities. Such statutes include [NRS 686A.100](#), [NRS 686A.110](#) and [NRS 686A.120](#).

#### A. Finder's Fees

With regard to your specific question on the propriety of the payment of a "bounty" or "finder's fee" to a teller or other bank employee who refers a customer to a licensed annuity agent in a bank, the first question is whether [NRS 683A.420](#) and [NRS 683A.440](#) regarding sharing commissions would apply.

[NRS 683A.420](#)(1), which deals with payment of commissions by insurance companies, equates "contract of insurance or of annuity" with "insurance" in the same sentence. Therefore, the plain meaning of [NRS 683A.420](#) is that it applies to both insurance and annuity contracts. There is also no reason not to read "insurance" in [NRS 683A.440](#), which deals with payment of commissions by agents or brokers to solicitors or other agents, as including both insurance and annuity contracts as well.<sup>5</sup> Therefore, the prohibition on sharing commissions with persons who are not licensed agents is applicable to annuities and is binding on banks as well. The "bounty" or "finder's fee" practice may be regulated by the commissioner of insurance if found to be an unauthorized splitting of commissions pursuant to [NRS 683A.440](#). A \$5 finder's fee paid to a bank teller for referring a customer to an annuities agent within the bank is a payment of a commission or compensation for or on account of the *solicitation* of insurance on property or risks in this state, and, therefore, pursuant to [NRS 683A.420](#) and [NRS 683A.440](#), such payment would be an illegal sharing of commissions with an unlicensed person.

#### B. Twisting, Misrepresentation, and Replacement of Policies Under Chapters 686A of NRS and NAC

We must look at the specific provisions to determine whether the statutes or regulations apply to annuities. The statutes pertaining to twisting, misrepresentation, and replacement of policies include [NRS 686A.050](#), [NRS 686A.310](#)(1)(a), [NRS 686A.030](#) and [NRS 686A.040](#). While none of these statutes specifically mentions annuities, it is up to the commissioner of insurance to

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<sup>5</sup> NRS 683A.440 does not contain language equating "contract of insurance or of annuity" with "insurance" as does NRS 683A.420(1). However, there is nothing contained in these statutes which would require a more narrow reading of "insurance" in NRS 683A.440 than in NRS 683A.420.

determine whether these statutes have traditionally been interpreted to apply to annuities or may reasonably be interpreted to apply to annuities through the application of other code sections.

#### C. Rebates, Free Checking or Other Incentives for Annuity Sales

A review of the pertinent statutes regarding rebates or incentives, namely [NRS 686A.110](#), [NRS 686A.120](#) and [NRS 686A.130](#), is in order to determine to what extent these statutes apply to annuities and to which types of annuities. Rebates, free checking or other incentives offered by banks acting as annuity agents may be prohibited by the commissioner of insurance as unlawful inducements for the purchase of annuities if found to apply to the particular type of annuity offered,<sup>6</sup> and no exception under these statutes applies.

#### D. Other Trade Practices Related to the Replacement of Life Insurance

Your final specific question is whether regulations related to the replacement of life insurance apply to banks selling annuities, and you reference [NAC 686A.510](#)—570, inclusive. These regulations are applicable to banks selling annuities if they have been applied to or can reasonably be interpreted to apply to annuities. If any statutes or regulations in question have no application to annuities, then they clearly would not apply.

### CONCLUSION TO QUESTION FOUR

The statutes and regulations of the chapters on unfair trade practices, [NRS 686A](#) and [NAC 686A](#) and other statutes and regulations within Title 57, apply to banks selling annuities if the particular statutes and regulations specifically apply to annuities, have been interpreted to apply to annuities, or may reasonably be interpreted to apply to annuities.

### QUESTION FIVE

Do the provisions of A.B. 756 apply only to state banks operating in Nevada, or to both state and national banks?

### ANALYSIS

The provisions of A.B. 756 apply both to state chartered banks and national banks. Neither A.B. 756 nor Title 55 of the NRS dealing with banks and related organizations limit their scope to only state-chartered banks. [NRS 657.016](#) defines "bank" for purposes of Title 55 as referring "to corporations, whether chartered by the state or Federal Government, conducting the business of receiving money as demand deposits or otherwise carrying on a banking or banking and trust business." Nor does [NRS 683A.110](#) or chapter 683A of NRS or NAC specifically prohibit the application of the statutes pertaining to banks selling annuities to national banks.

[NRS 662.015](#)(1), as amended by A.B. 756 which added subsection (h), now reads in pertinent part:

In addition to the powers conferred by law upon private corporations, a bank may:

.....  
(h) *Unless otherwise specifically prohibited by federal law*, sell annuities if licensed by the commissioner of insurance. [Emphasis added.]

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<sup>6</sup> Foolr example, NRS 686A.110(1) mentions only "life annuity."

The Court of Appeals for the Fifth Circuit recently held in *Variable Annuity Life Ins. Co. v. Clarke*, 998 F.2d 1295 (5th Cir. 1993), that 12 U.S.C. § 92 (1916)<sup>7</sup>, which states that national banks may sell insurance in communities not exceeding 5,000 inhabitants, necessarily *prohibits* the sale of insurance by national banks in communities with a population larger than 5,000 inhabitants.<sup>8</sup> In rejecting the Office of Comptroller of Currency (OCC) opinion<sup>9</sup> and the district court's ruling,<sup>10</sup> the court went on to hold that annuities were insurance products, both historically and functionally, and therefore the statute's implied prohibition on selling insurance in communities with over 5,000 inhabitants necessarily applied to the sale of annuities as well. *Id.* at 1300-01.

While the *Clarke* opinion is entitled to a great deal of weight, we believe that to read "insurance" as "insurance products" goes beyond the plain meaning of the term "insurance." "Insurance" is defined in *Black's Law Dictionary*<sup>11</sup> as "[a] contract whereby, for a stipulated consideration, one party undertakes to compensate the other for *loss* on a specified subject for specified perils." (Emphasis added.) Indeed, there is virtually no authority holding that annuities are actually "insurance."<sup>12</sup> However, there is much authority which holds that annuities are not insurance, but rather investment products.<sup>13</sup>

Therefore, until the United States Supreme Court interprets 12 U.S.C. § 92 (1916) as prohibiting national banks from selling annuities, or there is other authority which would cause us to change our opinion, we hold that national banks may be licensed to sell annuities in the State of

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<sup>7</sup> 12 U.S.C. § 92 reads in pertinent part:

In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life or other insurance company authorized by the authorities of the State in which such bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent . . . .

<sup>8</sup> 12 U.S.C. § 92 (1916) was held to have been repealed by Congress in 1918 by the Court of Appeals for the District of Columbia Circuit in *Independent Ins. Agents of Am., Inc. v. Clarke*, 955 F.2d 731 (D.C. Cir. 1992). However, the Supreme Court reinstated this statute and held it had not been repealed by Congress. See *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am.*, 113 S.Ct. 2173, 2179 (1993). Therefore, 12 U.S.C. § 92 (1916) which permits national banks to sell insurance in communities not exceeding 5,000 inhabitants, is a valid statute.

<sup>9</sup> See OCC Interpretive Letter No. 499.

<sup>10</sup> *Variable Annuity Life Ins. Co. v. Clarke*, 786 F. Supp. 639 (S.D. Tex. 1993).

<sup>11</sup> *Black's Law Dictionary*, 802 (6th ed. 1990).

<sup>12</sup> "Insurance" is to be distinguished from "insurance products" and the "business of insurance" under the McCarran-Ferguson Act, 15 U.S.C. § 1011 (1945) *et seq.* The only case we are aware of which may hold that annuities are actually "insurance" is *Securities and Exchange Commission v. Variable Annuity Life Insurance Company*, 395 U.S. 65 (1959) which in holding that variable annuities are *not* insurance, appears to hold *in dicta* only that *fixed* annuities are insurance for purposes of insurance exemptions to registration requirements under federal security laws.

<sup>13</sup> See *In re Howerton*, 21 B.R. 621, 623 (1982); *Daniels v. Pecan Valley Ranch, Inc.*, 831 S.W.2d 372 (Tex. App. 1992); *Daniel et al. v. Life Insurance Co. of Virginia*, 102 S.W. 2d 256 (Tex. App. 1937); *New York State Association of Life Underwriters v. New York State Banking Department, et al.*, 598 N.Y.S.2d 824, 828 (1993); *Mercy v. Olsen*, 672 S.W.2d 196, 198 (Tenn. 1984); *Prudential Ins. Co. of America v. Howell*, 148 A.2d 145 (N.J. 1959); *In re Vinzant*, 108 B.R. 752 (1989). *Couch on Insurance*, 2d § 81:2.

Nevada. Furthermore, national banks are subject to all state laws regarding licensure and sale of annuities unless specifically preempted by federal law.<sup>14</sup>

#### CONCLUSION TO QUESTION FIVE

The provisions of A.B. 756 apply to both state and national banks. Therefore, national banks may be licensed to sell annuities and are subject to the same state licensing requirements as state banks.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: EDWARD T. REED  
Deputy Attorney General

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OPINION NO. 94-03    LIABILITY; LICENSES; WILDLIFE: Licensing of private wildlife possession by the Division of Wildlife creates no basis for state liability for injuries caused by lawfully possessed wildlife.

Carson City, March 17, 1994

Mr. William A. Molini, Administrator, Division of Wildlife, Post Office Box 10678, Reno, Nevada 89520-0022

Dear Mr. Molini:

You have asked this office for an opinion regarding the Division of Wildlife's potential liability for personal injury caused by privately-held captive wildlife. Your question is more specifically as follows:

#### QUESTION

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<sup>14</sup> The National Bank Act, 12 U.S.C. § 21 (1864) *et seq.*, is federal legislation which may preempt state legislation depending upon the intent of the federal law. There is no question that national banks are and have always been subject to state laws unless those laws infringe national banking laws or impose an undue burden on the performance of bank functions. *Anderson Nat'l Bank v. Lockett*, 321 U.S. 233, 248 (1944); *McClellan v. Chipman*, 164 U.S. 347 (1896).

Therefore, we must look at the specific question of whether Congress has manifested its intent within the National Bank Act, 12 U.S.C. § 21, *et seq.*, to preclude all state action on the issue of national banks selling annuities. There is nothing specifically within the National Bank Act or within any caselaw interpreting it, which would prohibit state action in this area. The fact that the licensing of agents selling annuities has always been a state concern, would lead one to believe that this should remain a state concern absent clear congressional intent to the contrary. Indeed, OCC Interpretive Letter 499 states on page 10: "Finally, the [National] Bank should determine whether any state laws govern this activity, and to the extent that they do, should comply fully with them."

The *McCarran-Ferguson Act*, 15 U.S.C. § 1001, *et seq.*, established that the continued regulation of the business of insurance by the states is in the public interest and should continue absent a federal law which specifically relates to the business of insurance. In *Securities and Exchange Comm'n v. National Securities, Inc.*, 393 U.S. 453, 458 (1969), the Supreme Court defined the "business of insurance" as including "the licensing of [insurance] companies and their agents."

Can the Division of Wildlife, as the agency responsible for regulating the possession of live wildlife, be held liable for human injuries or death caused by captive wildlife which is lawfully held?

### ANALYSIS

The Nevada Division of Wildlife (Division), in concert with the Nevada Board of Wildlife Commissioners (Commission), is the state agency responsible for authorizing possession of wildlife.

1. Except as otherwise provided in this section and [NRS 503.590](#), or unless otherwise specified by a regulation adopted by the commission, no person may:

(a) Possess any live wildlife unless he is licensed by the division to do so.

....

3. In accordance with the regulations of the commission, the division may issue commercial and noncommercial licenses for the possession of live wildlife upon receipt of the applicable fee.

### [NRS 504.295](#)

The Commission is responsible for creating regulations governing licensing. "The commission shall adopt regulations for the possession of live wildlife. The regulations must set forth the species of wildlife which may be possessed and propagated, and provide for the inspection by the division of any related facilities." [NRS 504.295\(2\)](#).

Regulations governing the application process and amending chapter 504 of the Nevada Administrative Code were adopted by the Commission on January 15, 1994.

Your request for an opinion envisions injury caused by an animal whose possession is licensed or otherwise sanctioned pursuant to this statutory and regulatory scheme, and asks whether the Division would bear financial liability for the injury as a result of this sanction.

Licensing activities by a state may give rise to liability in some circumstances, but the courts generally are disinclined to find a cause of action in such cases. *See generally* 57 Am. Jur. 2d *Municipal, County, School and State Tort Liability* § 216 (1988). This unwillingness derives from a sometimes tacit policy which disfavors "transform[ing] [a regulating] agency into an insurer of safety." *MacDonald v. State*, 281 Cal. Rptr. 317, 327 (Cal. Ct. App. 1991).<sup>15</sup>

The decision in *MacDonald* is instructive for a general understanding of this area of the law. In *MacDonald*, the parents of a child injured at a day care facility sued the state of California. The basis of the complaint was the alleged negligence of the state in inspecting and issuing a license to the facility. The court affirmed the trial court's grant of judgment on the pleadings against the injured child. In so doing, the court addressed two theories of state liability.

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<sup>15</sup> The policy is further explained by the Maryland court.

A proliferation of suits and judgments . . . against the State and/or local governments based upon duties or special relationships, perceived by the litigants to have been created to run to them personally, as opposed to the public generally, might well cause the legislative branch to pause and reconsider the feasibility of continuing . . . regulatory activity [to protect public safety].

The court first examined for an express statutory duty to support plaintiff's per se negligence claim. If a statute creates a duty, and if the duty is breached, then negligence exists as a matter of law. The court, although finding an express duty for the state to investigate day care facilities, ultimately determined it was not the kind of duty which would support a per se negligence claim. In addition to finding a statutory duty, the law in California requires: (1) the duty be mandatory; (2) its scope includes preventing injuries such as the one suffered by the party making the claim; and (3) its breach must be the proximate cause of the injury. The court found none of these elements existed.

It is unnecessary in this opinion to make as detailed an inquiry into per se negligence. Per se negligence in Nevada also requires that the statutory duty be owed to a particular class of persons. See e.g. *Sagebrush Ltd. v. Carson City*, [99 Nev. 204](#), 208, 660 P.2d 1013 (1983) (violation of a statute may constitute negligence per se only if the injured party belongs to the class of persons that the statute was intended to protect). Unless this showing is made, there is no need to inquire further into the mandatory nature of the duty, its scope, and proximate causation.

A similar requirement exists for a general negligence claim, which is the second type of claim examined by the court in *MacDonald*. Such a claim rests on a general common law duty not created by statute, but by the nature of the relationship between the parties. *MacDonald*, at 326-27.

Thus the initial inquiry is essentially the same whether a negligence action is based on a general or a per se claim. The tort claimant must demonstrate a duty owed to the individual or to a class of persons. *Joynt v. California Hotel and Casino*, [108 Nev. 539](#), 835 P.2d 799 (1992). This requirement exists no less where a state is the defendant in an action. When the duty is owed to the public rather than to a particular individual or class, no liability will arise from its breach. *MacDonald*, at 327.

The *MacDonald* court declined to find a common law duty to the injured plaintiff stemming from the state's responsibilities as a day care regulator. "[The state] assumed no duty of care toward [the child] that was greater than that owed to any other member of the public . . . . There was no heightened duty of care to this child based on any individualized placement of him by the government into a position of peril." *MacDonald*, at 327.

Numerous decisions from other jurisdictions, including Nevada, recognize this "public duty doctrine." *Coty v. Washoe County*, [108 Nev. 757](#), 760, 839 P.2d 97 (1992). See *Scott v. Department of Commerce*, [104 Nev. 580](#), 585, 763 P.2d 341 (1988) (when a governmental duty runs to the public, no private cause of action is created by a breach of such duty); *Guthrie v. State*, 539 N.E.2d 697, 699-700 (Ohio App. 1988), (the duty involved [in licensing liquor establishments] is to the public generally and to the applicant for a permit, or the permit holder, not to individual patrons of the licensed establishment).

The reasoning employed in these decisions will assist if applied to the present inquiry. First, the existence of a statutory duty to protect public safety is doubtful. There is no express reference to public safety anywhere in the pertinent statutes. The wildlife laws of the state, which it is the duty of the Division to administer, [NRS 501.331](#), are principally concerned with the "preservation, protection, management and restoration of wildlife." [NRS 501.100](#), [501.105](#). The emphasis, if not the entirety, of the Division's responsibility is the protection of wildlife, not human safety.

Second, even if there were either a statutory or common law duty found for safeguarding public safety, the Division's responsibilities in this regard would be to the public generally. Therefore no cognizable claim for money damages can be stated based on the Division's performance of its licensing activities.

## CONCLUSION

When the Division licenses the possession of wildlife, it bears no duty to protect the safety of particular individuals or of a class of persons. Under the public duty doctrine, the Division therefore should incur no liability for monetary damages in the event the captive wildlife caused human injury or death.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: C. WAYNE HOWLE  
Senior Deputy Attorney General

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OPINION NO. 94-04 ACCOUNTANTS; LIABILITY; PARTNERSHIPS: A limited liability partnership from another state may register with the Board as a partnership.

Carson City, March 25, 1994

Todd Russell, Esquire, Nevada State Board of Accountancy, Post Office Box 646, Carson City, Nevada 89703

Dear Mr. Russell:

You have posed the following question on behalf of the Nevada State Board of Accountancy (Board).

#### QUESTION

If a certified public accounting entity is organized in another state as a limited liability partnership (LLP), may that entity register with the Board as a general partnership?

#### ANALYSIS

In your opinion request you concluded that an LLP from another state could register with the Board. We agree with your conclusion.

To date five states have enacted LLP laws.<sup>16</sup> The statutes in each of these five states specify that LLPs are indeed partnerships by way of definition. Nevada has not enacted a law enabling a partnership to be created in the LLP style.<sup>17</sup>

Pursuant to [NRS 87.060](#)(1): "A partnership is an association of two or more persons to carry on as co-owners of a business for profit." Pursuant to [NRS 87.070](#)(4): "The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business . . . ."

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<sup>16</sup> See Del. Code Ann., tit. 6, § 1506(a) (1993); D. C. Code Ann., § 41-101 (1993); La. Rev. Stat. Ann., § 9:3431 (West 1993); and Tex. Rev. Civ. Stat. Ann. art. 6132b--3.08 (West 1994).

<sup>17</sup> This opinion does not address limited liability companies formed pursuant to NRS chapter 86.

Providing an LLP status to a general partnership in another state would not alter the basic nature of the entity as a general partnership. LLP status simply allows the general partners, by statute, to limit their joint and several liability for certain types of conduct. This legal opinion specifically does not address the issue of whether the liability limitation statutes of such a foreign partnership would be recognized and accepted by the Nevada Courts.

As with general partnerships, LLPs continue to be formed by contractual agreements between the partners. LLP status does not negate the profit-sharing element of the partnership and thus meets the prima facie definition of "partnership" under [NRS 87.070\(4\)](#). Participation in the management and co-ownership of property in an LLP entity are still controlled by the language of the partnership agreement just as in a general partnership. Apparently, the primary element of an LLP that differs from a general partnership involves the partners' obligation in contributing toward loss sharing.

Finally, the health, safety and welfare requirements of our state would not be weakened by allowing LLPs to register as partnerships in Nevada. The protections set forth in [NRS 628.340](#) would have to be fully complied with by an LLP just as with any other general partnership. These statutory protections tend to ensure that only accountants with the requisite qualifications render public accounting services to our citizens.

#### CONCLUSION

A partnership properly organized as an LLP under the applicable laws of another state would be eligible to register with the Board as a "partnership" of certified public accountants.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: ROBERT L. AUER  
Senior Deputy Attorney General

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OPINION NO. 94-05 MUNICIPAL COURTS: Under [NRS 5.023](#), the classes of persons who may serve as a municipal judge *pro tempore* include: (a) members in good standing of the Nevada State Bar; or (b) adult residents of the city; or (c) justices of the peace of the county.

Carson City, March 25, 1994

Mr. Steven P. Elliott, Sparks City Attorney, Post Office Box 857  
Sparks, Nevada 89432-0857

Dear Mr. Elliott:

You have asked what classes of persons may serve as a municipal judge *pro tempore*.

#### QUESTION

Are there three separate classes of persons who may be selected by a governing body of a city to serve as a substitute municipal judge under [NRS 5.023](#)?

## ANALYSIS

In your opinion request you conclude that three separate classes of persons may serve as a municipal judge *pro tempore*. We agree with that conclusion.

[NRS 5.023](#)(1) states:

1. The governing body of the city shall select a number of persons it determines appropriate to comprise a panel of substitute municipal judges. The persons selected must be:

- (a) Members in good standing of the State Bar of Nevada;
- (b) Adult residents of the city; or
- (c) Justices of the peace of the county.

By the use of semicolons in between each of the classes of persons listed in [NRS 5.023](#)(1), and the absence of the word "and" to connect said classes, it appears that the plain language of the statute allows selection from any of the separate columns (a), (b) or (c). It is well settled in Nevada that words in a statute should be given their plain meaning unless it violates the spirit of the act. *See McKay v. Bd. of Supervisors*, [102 Nev. 644](#), 648, 730 P.2d 438 (1986). Thus we conclude that the substitute municipal judge may be either: (a) a member in good standing of the State Bar of Nevada; or (b) an adult resident of the city in question; or (c) a justice of the peace of the county wherein the city is located.

If there is any question of ambiguity regarding the language of [NRS 5.023](#) our review of the effect of the 1981 legislative act creating said statute confirms a legislative intent to create three separate classes of persons for municipal judge *pro tempore*. The leading rule of statutory construction for ambiguous statutes is to ascertain the intent of the legislature in enacting said statute. *See City of Las Vegas v. Macchiaverna*, [97 Nev. 256](#), 257, 661 P.2d 879 (1983). In reviewing the title of Assembly Bill 270 (hereinafter A.B. 270) and the Assembly Judiciary committee minutes wherein [NRS 5.023](#) was enacted, we have determined that the legislative intent clearly involved three classes of persons.

Prior to 1981, the only substitute for a municipal court judge was a justice of the peace. When A.B. 270 was introduced in 1981 its title reflected that it was: "An act relating to police judges; *broadening the group of persons eligible to substitute for them*; and providing other matters properly relating thereto." (Emphasis added.)

The Assembly Judiciary Committee minutes on the A.B. 270 hearing of March 17, 1981, were previously submitted to you. Those minutes reflect the manner in which broadening the classes of substitute municipal judges would be accomplished. As set forth in the minutes A.B. 270: ". . . increases the type of people who can serve as a temporary Police Judge; i.e., any person who is a member in good standing of the Bar Association, a Justice of the Peace, or a citizen of the community. This bill does not require that a Police Judge be a lawyer; in fact, it opens it up to non-lawyers."

## CONCLUSION

There are three separate classes of persons who may be selected by the governing body of the city to serve as substitute municipal court judges. [NRS 5.023](#)(1) lists those classes of persons as being either a member of the State Bar of Nevada in good standing or an adult resident of the city or a justice of the peace of the county.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: ROBERT L. AUER  
Senior Deputy Attorney General

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OPINION NO. 94-06 PURCHASING; BIDS: State Purchasing Act requires directly notifying vendors of bid information.

Carson City, April 7, 1994

Mr. Tom Tatro, Administrator, Purchasing Division, Department of Administration, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Tatro:

This opinion is in response to your request regarding the possible use of a "bid distribution service." As you describe it, this service, which would be provided by a private firm, would possess current invitations to bids issued by the purchasing division and would make this information available to prospective vendors upon their request. This procedure would largely replace the existing procedure whereby the purchasing division itself mails invitations to bid to all vendors who have requested to be placed on the division's vendor mailing list. You indicate that use of the bid distribution service would be more efficient and economical than the procedure currently used.

The availability and apparent desirability of this alternative method for distributing bid information have given rise to the questions discussed below.

#### QUESTION ONE

Would use of the bid distribution service comply with legal requirements for providing notice and other information concerning requests for bids?

#### ANALYSIS

The proposed bid distribution service you describe involves multiple aspects, some of which are and some of which are not consistent with existing statutes.

First, it is indicated that in order to obtain information about current invitations to bid, prospective bidders telephone a "bid line." In other words, the burden of obtaining this information would rest with prospective bidders, not with the purchasing division. As you know, [NRS 333.300](#)(1) provides:

Except as otherwise provided in [NRS 333.375](#), the chief shall give reasonable notice, by advertising and by written notice mailed to persons, firms or corporations in a position to furnish the classes of commodities involved, as shown by its records, of proposed purchases of supplies, materials and equipment to be purchased in accordance with a schedule prepared in conformity with the provisions of [NRS 333.250](#).

The proposed procedure you describe would seem to be consistent with the evident purpose of government purchasing statutes which require the government agency to give notice of its

procurement needs to possible vendors. In *Breitling Bros. v. Utah Golden Spikers, Inc.*, 597 P.2d 869, 871 (Utah 1979), the court stated:

The requirement of public notice by advertising, and the acceptance of bids, serves to protect the public interest and taxpayers from any dealings in secrecy, or from officials showing favoritism or engaging in collusion with friends or political supporters, and from any ill considered, unnecessary, or extortionate contracts.

The difficulty with respect to the current Nevada statute, however, is that it unambiguously and specifically requires the purchasing division to provide written notice to prospective vendors. Consequently, it is not appropriate to go beyond the statutory language to ascertain its purpose. *Robert E. v. Justice Court*, [99 Nev. 443](#), 664 P.2d 957 (1983) (if statute under consideration is clear on its face, court cannot go beyond the statutory language in determining legislative intent).

The possibility that the legislature may have never considered the potentially more economical alternative of a bid distribution service does not alter our conclusion that current law would not allow the purchasing division to unilaterally replace the procedure described in [NRS 333.300\(1\)](#). The historical setting at the time a statute is enacted may only be considered if the statute is ambiguous. *Moncrief v. Wyoming State Bd. of Equalization*, 856 P.2d 440 (Wyo. 1993). In any event, there is nothing about the concept of a bid distribution service that put it outside the contemplation of the legislature when it enacted [NRS 333.300\(1\)](#).

Based on the above, it is our view that unless a prospective vendor agrees to designate the bid distribution service as its agent for the purpose of receiving the notice required by the statute, the proposed procedure you describe cannot replace the requirement that the purchasing division mail written notice to persons in a position to furnish the classes of commodities involved.

Second, it is our understanding that with respect to more complex transactions, it is not your practice to include the specification and quotation information in the advertisement or written notice required under [NRS 333.300\(1\)](#). In fact, [NRS 333.310\(1\)](#) provides that advertisements for bids must state where and how specifications and quotation forms may be obtained. The Purchasing Act, however, does not require the purchasing division to utilize any particular procedure for furnishing specifications and quotation forms to prospective bidders. Accordingly, use of the bid distribution service as described in your letter for the purpose of distributing specification and quotation information as provided in [NRS 333.310\(1\)](#) would not conflict with Nevada statutes.

#### CONCLUSION TO QUESTION ONE

With respect to mailing notice, [NRS 333.300\(1\)](#) would not permit the purchasing division to unilaterally substitute the bid distribution service procedure for the mailing requirement. It would be permissible for the purchasing division to secure a vendor's consent to designate the bid distribution service as the vendor's agent for receiving the required notice. In those instances where the specifications and quotation forms are not included in the required notice, but must be requested by the vendors, the division may use the bid distribution service without the vendors' consent to facilitate distribution of this material.

#### QUESTION TWO

Would notification of current registered vendors by letter constitute adequate notice of the change in procedure from mailing out bid information to use of the bid distribution service?

#### ANALYSIS

The response to this question is to some extent implied by the analysis and conclusion in response to Question One. With respect to the issue of compliance with the notice requirement of [NRS 333.300](#)(1), the purchasing division must essentially obtain the agreement of the vendors to utilize the bid distribution service. The purchasing division cannot unilaterally require vendors to use the bid distribution service in lieu of the mailing requirement of [NRS 333.100](#)(3). Accordingly, the question regarding the adequacy of notice becomes moot.

With respect to those transactions where the specifications and quotation forms are not included in the mailed notice, however, [NRS 333.310](#)(1) provides that advertisements for bids must specify where and how specifications and quotation forms may be obtained. It follows that if a general advertisement suffices to inform vendors that they can obtain this information and material from a bid distribution service, then a letter directed to an individual vendor would be more than adequate notice for this particular purpose.

### CONCLUSION TO QUESTION TWO

Since the purchasing division cannot unilaterally substitute the bid distribution service procedure for the statutory mailing requirement, the question regarding the adequacy of notice of such a change in procedure becomes moot. For the purpose of complying only with [NRS 333.310](#), however, a letter directed to vendors constitutes more than adequate notice.

### QUESTION THREE

May vendors be required to pay for copies of bid packets?

### ANALYSIS

As you know, the Purchasing Act is silent on the subject of whether vendors or the state bears the cost of copying bid packets. However, chapter 239 of NRS, known as Nevada's Public Records Law, permits government agencies to assess a fee for the service of copying and certifying public records. Because the expressions "public books" and "public records" are not defined in the statutes, a balancing test is applied by the courts, as well as this office, to determine whether a particular type of record is public. *Donrey of Nev., Inc. v. Bradshaw*, [106 Nev. 630](#), 798 P.2d 144 (1990); Op. Nev. Att'y Gen. No. 89-18 (Nov. 30, 1989). Beginning with a presumption in favor of open government, a record should be deemed public unless there is a sufficient justification, such as an identifiable privacy or law enforcement interest, for keeping the record confidential. Applying this test to the bid packets generated by the purchasing division, we have no difficulty in concluding that such materials are public records. Thus, [NRS 239.010](#)(1) applies to such records:

All public books and public records of a public agency, a university foundation or an educational foundation, the contents of which are not otherwise declared by law to be confidential, must be open at all times during office hours to inspection by any person, and may be fully copied or an abstract or memorandum may be prepared from those public books and public records. Any such copies, abstracts or memoranda may be used to supply the general public with copies, abstracts or memoranda of the records or may be used in any other way to the advantage of the public agency, university foundation or educational foundation or of the general public.

Although this provision does not explicitly address the issue of whether the state agency or the requesting party bears the cost of copying, this office has consistently advised our client agencies that it is permissible to charge a copying fee that does not exceed cost. This advice is based on the fact that the language of [NRS 239.010](#)(1) only requires that public books and records be "made available" for inspection and copying. The statute does not go further in the sense of requiring

state agencies to physically make photocopies themselves, or even to provide the paper or equipment to do so.

Based on the above, it is permissible to charge vendors a fee for photocopying bid packets. We recommend that to the extent the division may be able to utilize a bid distribution service, the independent contract negotiated with a provider of this service specify that a copying and mailing fee not exceeding costs be charged to the vendors.

#### CONCLUSION TO QUESTION THREE

Vendors may be charged a fee not exceeding costs to obtain a copy of the bid package.

#### QUESTION FOUR

May the purchasing division distribute bid packages independently of any bid distribution service it utilizes?

#### ANALYSIS

Assuming that use of a bid distribution service is proper to some extent, nothing in [NRS chapter 333](#) requires the purchasing division to utilize only one method of distribution. *See* [NRS 333.310\(1\)](#). As you point out, prospective vendors could conceivably attempt to request bid invitation information in person at the division office. It is evident from the Purchasing Act that it is based on the policy of competition. *See generally*, [NRS 333.300](#); [NRS 333.210](#); [NRS 333.220](#). Distributing bid copies through more than one means is certainly consistent with this policy and is not prohibited by any specific provision in the Purchasing Act. We suggest, however, that any contract negotiated with a bid distribution service specify that it will not be the sole source of bid information.

#### CONCLUSION TO QUESTION FOUR

The purchasing division may distribute bid packages independently of any bid distribution service it utilizes.

Hopefully the above is responsive to your inquiry and will be of some immediate help to the purchasing division. In light of the cost savings that the state could realize from utilization of the bid distribution service, you may want to consider proposing legislation that would explicitly allow the purchasing division to use this method on a comprehensive basis. Please contact the undersigned if you need further assistance.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: ROBERT A. KIRKMAN  
Deputy Attorney General

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OPINION NO. 94-07 BONDS; FINANCE: A city may seek waiver by the state board of finance if the city cannot make any single determination as required by [NRS 268.530\(1\)\(b\)](#) and (c); however, the state board of finance may not make all findings or pass resolutions required on behalf of a city.

Carson City, April 18, 1994

Mr. Larry Struve, Chief of Industrial Development, Department of Business and Industry,  
1665 Hot Springs Road, Carson City, Nevada 89710

Dear Mr. Struve:

You have asked several questions of this office regarding the sufficiency of the findings by the Las Vegas City Council with respect to the issuance of bonds pursuant to [NRS 268.512](#), *et seq.*

### FACTS

Cambridge Health Systems, a Nevada not-for-profit corporation with 501(c)(3) standing pursuant to the Internal Revenue Code, approached the Nye County Commission in early 1993 with a proposal to have the county issue bonds on behalf of Cambridge Health Systems for a health care facility located entirely within Clark County. This office, in Op. Nev. Atty'y Gen. No. 93-19 (Aug. 10, 1993) opined that the Nye County Commission is not authorized to issue economic development revenue bonds (pursuant to [NRS 244A.697](#)) to finance a health care facility that is located entirely outside the boundaries of the county where the commission sits. Cambridge Health Systems then approached the Clark County Commission with the same proposal. The Clark County Commission declined to support the project. The project sponsors approached the Las Vegas City Council concerning the same project. The Las Vegas City Council adopted a resolution in support of the project, the sufficiency of which is the basis for this opinion request.

Resolution R-106-93 of the Las Vegas City Council states in pertinent part:

Section 3. **Request of State Board of Finance.** *To date the City has not been provided with the information needed to make the findings and determinations required by [NRS 268.530](#). Pursuant to Subsection 2 of [NRS 268.530](#) the City requests that the State Board of Finance review such evidence as it believes necessary to approve the issuance of Bonds by the Department.*

.....  
Section 6. **Purpose.** The City is adopting this Resolution based upon the representation of Cambridge that the financing of the Project will promote the public health by enabling the acquisition, development, expansion and maintenance of health and care facilities and supplemental facilities for health and care facilities. [Emphasis added.]

### QUESTION ONE

Given the aforesaid facts, must the "terms" set forth in the resolution of the Las Vegas City Council requesting the Director of the Department of Business and Industry to issue revenue bonds on behalf of the city as used within the meaning of the City Economic Development Revenue Bond Law ([NRS 268.512](#), *et seq.*) include the findings and determinations required to be made by the governing body of the city in section (1) of [NRS 268.530](#)?

### ANALYSIS

The resolution set forth above in part was adopted by the Las Vegas City Council pursuant to the provisions of the City Economic Development Bond Law codified at [NRS 268.012](#), *et seq.* Specifically, [NRS 268.530](#) requires a city to make determinations concerning a given project which is brought to them for financing. [NRS 268.530](#) states in pertinent part:

1. After holding a public hearing as provided in [NRS 268.528](#), the governing body shall proceed no further until it:

(a) Determines by resolution the total amount of money necessary to be provided by the city for the acquisition, improvement and equipment of the project;

(b) Receives a 5-year operating history from the contemplated lessee, purchaser or other obligor, or from a parent or other enterprise which guarantees principal and interest payments on any bonds issued;

(c) Receives evidence that the contemplated lessee, purchaser, other obligor or other enterprise which guarantees principal and interest payments, has received within the 12 months preceding the date of the public hearing a rating within one of the top four rating categories of either Moody's Investor Service, Inc., or Standard and Poor's Corporation, except that a public utility regulated by the public service commission of Nevada, the obligor with respect to a project described in [NRS 268.5385](#), a health and care facility or a supplemental facility for a health and care facility is not required to furnish that evidence;

(d) Determines by resolution that the contemplated lessee, purchaser or other obligor has sufficient financial resources to place the project in operation and to continue its operation, meeting the obligations of the lease, purchase contract, or financing agreement; and

(e) Finds by resolution that the project:

(1) Will provide a public benefit;

(2) Would be compatible with existing facilities in the area adjacent to the location of the project;

(3) Will encourage the creation of jobs for the residents of the state;

(4) Is compatible with the general plan of the city adopted pursuant to chapter 278 of NRS; and

(5) If not exempt from the provisions of subsection 2 of [NRS 268.527](#), will not compete substantially with an enterprise or organization already established in the city or the county within which the city is located.

2. The governing body may refuse to proceed with any project even if all the criteria of subsection 1 are satisfied. If the governing body desires to proceed with any project where any criterion of subsection 1 is not satisfied, *it may do so only with the approval of the state board of finance. In requesting the approval, the governing body shall transmit to the state board of finance all evidence received pursuant to subsection 1.* [Emphasis added.]

The Las Vegas City Council, in passing the resolution in question, did not make any enumerated findings required by the statute. In fact, the resolution by its own terms indicates that no evidence was provided to the city in order for it to make any determinations in accordance with the statute. The resolution appears to delegate to the State Board of Finance the duty make the appropriate findings pursuant to the statute.

The statute is clear on its face that a city may continue to proceed with the issuance of bonds in support of a project if a "criterion" is not satisfied, but *only* upon approval of the State Board of Finance. "Criterion" is used singly in the statute. *Approval* of the city's ability to go forward is the sole authority of the State Board of Finance. No mention is made of the state board of finance's ability to make its own findings with respect to every enumerated determination within [NRS 268.530](#). In order to seek State Board of Finance *approval* the city must transmit any and all evidence presented to the city in support of the project. Responsibility for factual determinations lies with the city under the language of the statute.

If the language of a statute is clear and unambiguous, there is no room for a different statutory construction. *Nevada Power Co. v. Public Service Commission*, [102 Nev. 1](#), 4, 711 P.2d 867, 869 (1986). "Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent. *McKay v. Bd. of Supervisors*, [102 Nev. 644](#), 648, 730 P.2d 438, 441 (1986). [NRS 268.530](#) is clear on its face. The city is required to make findings of a factual nature. There is no language contained within [NRS 268.530](#) which provides for the

delegation of such a function from the city to the state board of finance. The language merely allows review by the state board of finance of the evidence taken at the city level, should the city be unable to make a particular finding required by the statute.

Statutes must be construed in light of its purpose as a whole. *Hampton v. Brewer*, [103 Nev. 73](#), 733 P.2d 852 (1987), *State v. Glusman*, [98 Nev. 412](#), 651 P.2d 639 (1982), *20th Century Hotel & Casino, Ltd. v. Clark County Fair & Recreation Bd.*, [97 Nev. 155](#), 625 P.2d 576 (1981). Allowing complete delegation of the statutory mandate to make findings obviates the purpose behind the City Economic Development Bond Law: to authorize cities to finance projects for listed reasons. [NRS 628.525](#). Each word, sentence, and phrase must be given meaning in the context of the purpose of the legislation as a whole. *Bd. of County Comm'rs v. CMC of Nevada*, [99 Nev. 739](#), 670 P.2d 102 (1983). A court will not construe a statute to produce an unreasonable result when another construction will produce a reasonable result. *Breen v. Caesars Palace*, [102 Nev. 79](#), 83-87, 715 P.2d 1070, 1072 (1986). [NRS 268.512](#)—.568 must be liberally construed in conformity with the purposes set forth in [NRS 268.524](#)(4). [NRS 268.525](#). It is the intent of the legislature to authorize *cities* to finance, acquire, own, lease, improve, and dispose of properties to "promote the health of residents of the city by enabling a private enterprise to acquire, develop, expand and maintain health and care facilities and supplemental facilities for health and care facilities which will provide services of high quality to those residents at reasonable rates." [NRS 268.524](#)(4). It appears from the transcript of the proceedings of the Las Vegas City Council hearing that the City believes it bears no responsibility for the issuance of the bonds. This impression is not in keeping with the statutory language or intent of the City Economic Development Bond Law.

#### CONCLUSION TO QUESTION ONE

Resolution R-106-93 does not comply with the requirements of [NRS 268.530](#). The resolution of the Las Vegas City Council must contain findings regarding [NRS 268.530](#)(1)(a), (d) and (e) and the record of the City Council proceedings supporting the issuance of the bonds must indicate evidence in support of [NRS 268.530](#)(1)(b) and (c). If the City is unable to make any single determination required by the statute, it may elect to continue to proceed but only after seeking the approval of the state board of finance. In seeking approval for the City to continue to proceed, the City must transmit to the state board of finance all evidence presented in support of the determinations of [NRS 268.530](#)(1).

#### QUESTION TWO

If the governing board of the city has no information or evidence on which to make the required determinations and findings required in section (1) of [NRS 268.530](#), as is stated in Resolution R-106-93, may the state board of finance completely waive the mandatory requirements of section (1) of [NRS 268.530](#) in the manner requested by the Las Vegas City Council in Resolution R-106-93, pursuant to the City's request based upon section (2) of [NRS 268.530](#)?

#### ANALYSIS

A full discussion of this issue is contained within the text of the answer to Question One. The state board of finance's role, from a plain reading of the statute, is limited to a review for sufficiency of the evidence taken by the city with respect to any one criterion. It is still the City's responsibility to make the findings and determinations necessary and to pass resolutions specific to the requirements of [NRS 268.530](#). Additionally, the state board of finance has no enumerated authority under [NRS 268.530](#) to pass resolutions on behalf of a city. The board may only approve or disapprove the city's ability to go forward on the basis of the evidence presented concerning criterion enumerated in the statute. *See, Nevada Power*, 102 Nev. at 4.

## CONCLUSION TO QUESTION TWO

The state board of finance may only approve or disapprove a city's ability to go forward on the basis of a review of all evidence presented to the city concerning any criterion required by the statute. The board may only do so after its review of all evidence presented to the city and the criterion supported by insufficient evidence is identified by the city. It appears at this time that the Resolution passed by the Las Vegas City Council is not sufficient for board of finance review.

## QUESTION THREE

Before revenue bonds are issued in the manner requested by the Las Vegas City Council in Resolution R-106-93, must the findings and determinations required to be made in section (1) of [NRS 268.530](#) first be established before bonds are issued; and if so, must the Director of the Department of Business and Industry require the City Council to make said findings and determinations before acting on the request to issue bonds on behalf of the City submitted pursuant to [NRS 268.539](#), even if the request for approval to proceed has been made to the state board of finance pursuant to [NRS 268.530](#)?

## ANALYSIS

The Director of the Department of Business and Industry must determine, pursuant to [NRS 269.539](#), that the bonds are marketable based upon the terms set forth in the resolution of the governing body requesting their issuance. In the facts presented to this office, no factual determinations required by the statute under which the bonds are to be issued appear in the resolution adopted by the Las Vegas City Council requesting the issuance of the bonds, other than reference to the lack of evidence in the record. The resolution contains no language concerning the total amount of money necessary to be provided by the city for the acquisition, improvement and equipment of the project, if any, as is required by [NRS 268.530](#)(1)(a). No language appears in the resolution determining that the contemplated lessee, purchaser or other obligor has sufficient financial resources to place the project in operation and to continue its operation, meeting the obligations of the lease, purchase contract, or financing agreement, required by [NRS 268.530](#)(1)(d). Nor does the resolution contain language finding that the project will provide a public benefit; be compatible with existing facilities; encourages the creation of jobs; is compatible with the general plan adopted by the city and will not compete substantially with other established enterprises. [NRS 268.530](#)(1)(e). These above-recited sections of [NRS 268.530](#) are not criteria which can be waived, rather they are integral parts of the resolution supporting the issuance of the bonds.

## CONCLUSION TO QUESTION THREE

[NRS 268.530](#) requires a city supporting the issuance of bonds on its behalf to adopt resolutions concerning certain determinations contained within [NRS 268.530](#). The director, after determining the marketability of the bonds *based upon the resolution supporting them* may proceed to issue the bonds. [NRS 268.539](#) (emphasis added). The director, pursuant to this statute, determines whether the resolution is sufficient for purposes of marketability of the bonds. If the director determines that the bonds are not marketable under the terms of the resolution supporting their issuance by the city, the director may decline to issue them. The statute carries with it the implied incidental power in the director to reject the resolution as insufficient to market the bonds. *See Checker, Inc. v. Public Serv. Comm'n*, [84 Nev. 623](#), 446 P.2d 981 (1968). Implicit in this ability to reject is the ability to request certain additional findings be made to make the resolution sufficient.

Approval by the state board of finance has been discussed previously in this opinion and will not be set forth in detail in this discussion. The board has no ability to pass resolutions or to take

evidence on its own pursuant to [NRS 268.530](#), therefor submission to the state board of finance is not relevant to the director's determination on the sufficiency of the resolution for purposes of marketing the bonds.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: DANA K. SAMMONS  
Deputy Attorney General

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OPINION NO. 94-08 LIABILITY; MINING; MINERALS, DEPT. OF; COUNTIES; B.L.M.; RECREATIONAL LAND USE; LANDS, PUBLIC: Fencing dangerous abandoned mine sites by the Division of Minerals or the counties, in the manner prescribed by regulation and with the permission of the landowner, is protected activity under relevant immunity statutes and Nevada's recreational use statutes.

Carson City, April 21, 1994

Mr. Russell A. Fields, Administrator, Division of Minerals, 400 W. King Street, Suite 106, Carson City, Nevada 89710

Dear Mr. Fields:

In response to the legislative direction to the Division of Minerals to create and administer a program for the abatement of dangerous conditions existing at abandoned mine sites in Nevada, you have requested an opinion from this office concerning the existence of civil liability with respect to the proposed program of fencing dangerous mine sites.

#### QUESTION

Does fencing abandoned mine sites in the manner prescribed by regulation satisfy the state's statutory requirements as found in [NRS 455.010](#), *et seq.*, and [NRS 513.073](#), *et seq.*, thus providing to the state, county or other responsible parties civil immunity from suit pursuant to [NRS 41.510](#) and [NRS 41.0331](#) from anyone injured at that location subsequent to fencing?

#### ANALYSIS

In 1989, this office issued a letter opinion in response to two questions from your department. Both questions concerned the existence of civil liability with respect to dangerous mine shafts. (Letter Opinion, October 24, 1989, authored by Brian Chally, Senior Deputy Attorney General.)

The 1989 opinion concluded, under Question One, that the owner or possessor of a mine shaft is at no time relieved of the duty to fence under [NRS 455.010](#); however, [NRS 41.510](#) does provide immunity from civil liability under certain conditions. [NRS 41.510](#) provides immunity to a land owner against any person injured while involved in recreational activities on his land, except where the land owner has acted willfully or maliciously, or where the land owner has allowed access to his land in exchange for consideration.

The second question, answered in 1989, was whether a property owner could be held civilly liable when a person destroys or circumvents fencing and then is injured by falling into a shaft.

The opinion concluded that immunity provided by [NRS 41.510](#) should apply "since an effort to destroy the fence to explore the shaft or even for the sole diversion of the destruction [of the fence] involved would fit within the definition of recreation." Ultimately, the opinion concluded that immunity from civil liability is available to the land owner even when a person destroys the fencing around the shaft and then is injured.

The opinion did not address your concern for potential civil liability to the state, county or other responsible parties who are not landowners but who fence dangerous abandoned mine sites in cooperation with the legislative mandate. In 1987, the legislature gave the Division of Minerals a mandate to create and administer a program for the identification of dangerous conditions existing at abandoned mine sites, and a duty to identify and rank them pursuant to the degree of danger. [NRS 513.094](#). Furthermore the statute requires the Commission on Mineral Resources to establish by regulation, standards allowing you to rank dangerous conditions and standards for use in abatement of those dangerous conditions. Once a year the Division is required to inform each board of county commissioners of dangerous conditions found in their counties. The counties may then apply to the Division for monies to abate the dangerous conditions identified. [NRS 513.108](#). This program is directed at those mine lands which are abandoned and for which there is no responsible party or current owner or operator.

The word "abatement" must be defined in order to give scope and definition to the legislative mandate. *State v. Webster*, [102 Nev. 450](#), 453, 726 P.2d 831 (1986) (The meaning of certain words in a statute may be determined after examination of the context in which they are used and by considering the spirit of the law, *citing Welfare Division v. Washoe County Welfare Dep't.*, [88 Nev. 635](#), 637-38, 503 P.2d 457 (1972)). The word "abatement" as defined in Black's Law Dictionary (6th ed. 1990) means "a reduction, a decrease, or a diminution." As applied to the Division's program, there is a distinction between diminishing or reducing dangerous conditions at an abandoned mine site and completely eliminating the dangerous condition. Fencing a dangerous condition does not eliminate it completely. Only by backfilling a dangerous condition can hazards to humans and animals be completely eliminated. The statutory mandate includes the development of standards for abating dangers which will exclude humans and animals. The legislature chose the word "abatement"; therefore, I believe the mandate is to diminish and/or reduce dangerous conditions at abandoned mine sites using methods or combinations of methods that effectively exclude persons and animals. *Dumaine v. State*, [103 Nev. 121](#), 125, 734 P.2d 1230 (1987) (words will be given ordinary meaning if possible); *State v. State of Nevada Employees Association, Inc.*, [102 Nev. 287](#), 289, 720 P.2d 697 (1986) (words which have definite and plain meaning retain that meaning unless clearly not intended). The plain meaning of the statutory mandate to abate dangerous conditions does not prescribe backfilling or any other specific method; therefore, fencing is within the contemplation of the legislature when it enacted [NRS 513.094](#)(2) and (4).<sup>18</sup>

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2. The administrator shall, within the limits of the money provided by this fee, establish a program to discover dangerous conditions that result from mining practices which took place at a mine that is no longer operating, identify if feasible the owner or other person responsible for the condition, and rank the conditions found in descending order of danger. He shall annually during the month of January, or more often if the danger discovered warrants, inform each board of county commissioners concerning the dangerous conditions found in the respective counties, including their degree of danger relative to one another and to such conditions found in the state as a whole. He shall further work to educate the public to recognize and avoid those hazards resulting from mining practices which took place at a mine that is no longer operating.

....

4. The commission shall provide by regulation:

(a) Standards for determining which conditions created by the abandonment of a former mine or its associated works constitute a danger to persons or animals and for determining the relative degree of danger. A condition whose existence violates a federal or state statute or regulation intended to protect public health or safety is a danger by virtue of that violation.

(b) Standards for abating the kinds of dangers usually found, including but not limited to standards for excluding persons and animals from dangerous open excavations.

The issue of liability with regard to the program of fencing dangerous conditions at mine sites has been the subject of several discussions and meetings among interested parties and participants in the abandoned mine lands program. A review of the applicable statutes in Nevada follows. Briefly, in 1866, the Nevada Legislature enacted the statute requiring any person who sank a shaft or excavation to cause to be erected a good and substantial fence or other safeguard and keep the same in good repair around mine works or shafts, sufficient to guard securely against danger to persons and animals. [NRS 455.010](#).<sup>19</sup> (See *infra* for analysis of liability under [NRS 455.010](#).) In 1963, the legislature added to chapter 41, a statute designed to limit a land owner's liability which is referred to as the state's "recreational use" statute. [NRS 41.510](#).<sup>20</sup> [NRS 41.510](#) provides that an owner, lessee, or occupant of premises owes no duty to keep the premises safe for entry or use by anyone using his land in a recreational capacity. The land owner is under no duty to give a warning of any hazardous condition, activity, or use of any structure on the premises to persons entering for recreational purposes. The only exception which removes the statutory shield is willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity or where the land owner grants entry to his land in exchange for consideration. Finally, the legislature in 1989, added [NRS 41.0331](#) which makes a person or any political subdivision of the state immune from civil liability for damages as a result of any act by him or it in constructing or causing to be constructed, pursuant to standards prescribed by the commission on mineral resources, a fence or other safeguard around an excavation.<sup>21</sup> Against this background of statutory

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<sup>19</sup> Any person or persons, company or corporation, who shall dig, sink or excavate, or cause the same to be done, or being the owner or owners, or in the possession under any lease or contract, of any shaft, excavation or hole, whether used for mining or otherwise, or whether dug, sunk or excavated for the purpose of mining, to obtain water, or for any other purpose, within this state, shall, during the time they may be employed in digging, sinking or excavating, or after they may have ceased work upon or abandoned the same, erect, or cause to be erected, good and substantial fences or other safeguards, and keep the same in good repair, around such works or shafts, sufficient to guard securely against danger to persons and animals from falling into such shafts or excavations.

<sup>20</sup>

1. Except as otherwise provided in subsection 3, an owner, lessee or occupant of premises owes no duty to keep the premises safe for entry or use by others for crossing over to public land, hunting, fishing, trapping, camping, hiking, sightseeing, hang gliding, para-gliding or for any other recreational purposes, or to give warning of any hazardous condition, activity or use of any structure on the premises to persons entering for those purposes.

2. Except as otherwise provided in subsection 3, if an owner, lessee or occupant of premises gives permission to another to cross over to public land, hunt, fish, trap, camp, hike, sightsee, hang glide, para-glide or participate in other recreational activities, upon his premises:

(a) He does not thereby extend any assurance that the premises are safe for that purpose, constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted.

(b) That person does not thereby acquired any property rights in or rights of easement to the premises.

3. This section does not:

(a) Limit the liability which would otherwise exist for:

(1) Willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity.

(2) Injury suffered in any case where permission to cross over to public land, hunt, fish, trap, camp, hike, sightsee, hang glide, para-glide or participate in other recreation activities, was granted for a consideration other than the consideration, if any, paid to the landowner by the state or any subdivision thereof. For the purposes of this subparagraph, the price paid for a game tag sold pursuant to NRS 502.145 by an owner, lessee or manager of the premises shall not be deemed consideration given for permission to hunt on the premises.

(3) Injury caused by acts of persons to whom permission to cross over to public land, hunt, fish, trap, camp, hike, sightsee, hang glide, para-glide or participate in other recreational activities was granted, to other persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.

(b) Create a duty of care or ground of liability for injury to person or property.

<sup>21</sup>

A person, the State of Nevada, any political subdivision of the state, any agency of the state or any agency of its political subdivisions is

immunity and statutory limitations in protecting the public and animals from injury as a result of dangerous conditions at abandoned mine lands, you must still consider whether the state or other responsible parties who fence dangerous conditions at abandoned mine sites may rely on the protections found in the immunity statutes.

Recently, the Nevada Supreme Court has construed [NRS 455.010](#), a statute which requires the owner or possessor of a "shaft, excavation or hole" to erect a "fence or other safeguard" to protect people and animals from falling in. *Ross v. Carson Construction*, [106 Nev. 885](#), 803 P.2d 657 (1990). This was a construction site case, where the plaintiff drove into a temporary excavation and was injured. The court unequivocally held that [NRS 455.010](#) imposes an absolute duty to safeguard open excavations regardless of permanency. 106 Nev. at 889. In reviewing prior case law in Nevada, the court found [NRS 455.010](#) applied to property owners whether on private ground or public ground. 106 Nev. at 888, *see Orr Ditch & Water Co. v. Justice Court*, [64 Nev. 138](#), 144-45, 128 P.2d 558, 561-62 (1947) (primary intent of statute was the prevention of injuries suffered from falling into unprotected mine shafts).

The *Ross* court cited an early Nevada case which suggests that this absolute duty to safeguard open excavations only runs to those who dug the shaft or thereafter abandoned it. *Ross*, 106 Nev. at 887, *citing Dixon v. Simpson*, [74 Nev. 358](#), 362, 332 P.2d 656 (1958). In *Dixon*, the court specifically considered whether the landowner and the subcontractor were responsible for injuries to a pedestrian who fell into an open excavation at a construction site. After applying [NRS 455.010](#) to the facts, the court determined that the duty to guard against hazardous conditions applied only to those who dug the excavation and retained control over it; therefore, only the owner was liable since the subcontractor had relinquished control over the excavation prior to plaintiff's injuries. *Dixon*, at 362. The court's opinion states: "To construe [[NRS 455.010](#)] otherwise would be to impose a continuing responsibility upon persons who may well have lost all right, authority and power to meet such responsibility. Such cannot have been the legislative intent." *Id.*

This holding clearly supports the Abandoned Mine Lands Program's reliance on the legislative exception to the waiver of sovereign immunity in [NRS 41.0331](#) and clarifies the object of the duty to safeguard hazardous conditions found in [NRS 455.010](#). Those who dig a shaft or thereafter abandon it have an absolute duty to safeguard open excavations. The duty does not continue to run to subsequent possessors; however, landowners may be ultimately responsible for dangerous conditions such as abandoned shafts, excavations, or other hazards where the landowner knew or should have known that the failure to guard or warn would very probably cause injury.<sup>22</sup>

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immune from civil liability for damages sustained as a result of any act or omission by him or it in constructing, or causing to be constructed, pursuant to standards prescribed by the commission on mineral resources, a fence or other safeguard around an excavation, shaft, hole or other dangerous condition at an abandoned mine for which the person, state, political subdivision or agency is not otherwise responsible.

<sup>22</sup> In 1990, the Ninth Circuit decided a case in which they reinterpreted Nevada law regarding the definition of "willfulness." *McMurray v. U.S.*, 918 F.2d 834 (9th Cir. 1990); *but see Gard v. U.S.*, 594 F.2d 1230, 1233 (9th Cir. 1979) ("willfulness under Nevada law means there must be design, purpose and intent to do wrong and inflict the injury, *citing Crossman v. So. Pacific Co.*, 44 Nev. 286, 194 P. 839 (1921)). Plaintiff, aged two, had been severely burned in a naturally flowing hot spring of 160° - 180° near Fallon, Nevada. Plaintiff sued BLM (landowner) for willful failure to warn or guard against a dangerous condition. See NRS 41.510(3)(a). The trial judge awarded plaintiff \$718,000; BLM appealed. The sole issue on appeal was whether BLM's failure to warn plaintiff of dangerous conditions at the hot spring was "willful." They held that the Nevada Supreme Court in *Davies v. Butler*, 95 Nev. 763, 602 P.2d 605 (1979) subsequent to the Ninth Circuit's holding in *Gard v. U.S.*, had redefined "willfulness" to remove any requirement of intent to injure and now defined willful misconduct as "intentional wrongful conduct done with the knowledge that serious harm to another will probably result." *McMurray*, 918 F.2d at 837.

Even though the duty to safeguard open excavations does not continue to run to subsequent possessors, once the Division identifies and ranks a dangerous condition at an abandoned mine site and proceeds to fence it, then the question of whether [NRS 41.510](#) (the recreational use statute) provides immunity still remains. Almost all the states have passed laws limiting landowner liability for those lands used for recreational activities. *Barrett, Good Sports & Bad Lands: The Application of Washington's Recreational Use Statute Limiting Landowner Liability*, 53 Wash. L. Rev. 1 (1977). Most of these laws are derived from a model act promulgated in 1965 by the Council of State Governments. The Model Act was drafted to encourage private landowners to open their land to recreational users. Those acts which do not specify whether public entities are covered or do not define "owner" must be construed by the courts utilizing the legislative history for a determination. Nevada's act ([NRS 41.510](#)) was passed in 1963; however, there is no legislative history from the 1963 session to indicate whether it was derived from the Model Act, nor does it specifically include public entities. The Legislative Counsel Bureau did not begin transcribing and reporting testimony before the committees until 1965. Nevertheless because approximately 87 percent of Nevada is public land it is probable that the act included public entities within its coverage. (See footnote 3).

The courts have applied [NRS 41.510](#) to federal landowners in Nevada in the past. *Gard v. U.S.*, 594 F.2d 1230 (9th Cir. 1979) (BLM not liable for personal injuries following plaintiff's fall into an unguarded mine shaft); *McMurray v. U.S.*, 918 F.2d 834 (9th Cir. 1990) (BLM liability based on Federal Tort Claims Act and the Nevada Recreational Use Statute, [NRS 41.510](#)); *Ducey v. U.S.*, 713 F.2d 504 (9th Cir. 1983) (*reversed and remanded*; on subsequent appeal from the district court's decision again in favor of the U.S. Park Service, the court found the Park Service to be under duty to warn recreational users of flood plain of hazards of major 100-year flood. *Ducey v. U.S.*, 830 F.2d 1071 (9th Cir. 1987)). There is no case applying [NRS 41.510](#) to the state or its political subdivisions. The statute does not specifically include the state or counties within its coverage and there is no state or federal case directly applying [NRS 41.510](#) to the state or county.<sup>23</sup>

If the Division or county is not the owner or lessee of the site being fenced they must fit within the definition of "occupant" to come within the coverage of [NRS 41.510](#). The Nevada Supreme Court has construed [NRS 41.510](#) in only one case since enactment in 1963. They noted that [NRS 41.510](#) precluded the imposition of a duty upon a sand and gravel operation near Las Vegas to protect a motorcycle rider who was injured when he crashed into the side of the company's gravel truck. *Brannan v. Nevada Rock and Gravel Co.*, [108 Nev. 23](#), 823 P.2d 291 (1992). The court said that an "occupier of open land owes no duty to keep premises safe . . . for recreational purposes." *Id.* at 25. The issue was whether the gravel company "possessed and controlled" the intersection thus giving rise to a duty to maintain it under the common law. See Restatement (Second) of Torts § 367 (1965). Without defining "occupier," the court found the record insufficient for Nevada Rock and Gravel to be an "occupier" and thus immune under [NRS 41.510](#). Whether the state or a county can be an "occupier" and thus entitled to immunity is still an open question in Nevada.

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<sup>23</sup> Some states' recreational use statutes expressly include public and private entities within its coverage (see Wash. Rev. Code Ann § 4.24.210 (West 1993) ("any public or private landowners or others in lawful possession and control . . . shall not be liable")); however, many do not, leaving the issue up to the courts. Most of the jurisdictions which have considered this issue have construed their statutes to include public as well as private entities. *Otteson v. United States*, 622 F.2d 516 (10th Cir. 1980); *Smith v. United States*, 383 F. Supp. 1076 (D. Wyo. 1974); *Dorman v. United States*, 812 F. Supp. 685 (S.D. Miss. 1993); *Palmer v. United States*, 742 F. Supp. 1068 (D. Hawaii 1990); *Page v. City of Louisville*, 722 S.W. 2d 60 (Ky.Ct.App. 1986); *Mitchell v. Cleveland Elec. Illuminating Co.*, 507 N.E.2d 352 (Ohio 1987); *Fastow v. Burleigh County Water Resource Dist.*, 415 N.W.2d 505 (N.D. 1987); *Rodriguez v. Fireman's Fund Ins. Co.*, 449 So.2d 1042 (La.Ct.App. 1984); *Watson v. City of Omaha*, 312 N.W.2d 256 (Neb. 1981); *But see, Chapman v. Pinellas County*, 423 So.2d 578 (Fla. Dist. Ct. App. 1982) (Florida recreational use statute did not apply to the county where purpose of the statute was to make privately owned property available for public use.); *Hovet v. City of Bagley*, 325 N.W.2d 813 (Minn. 1982) (Minnesota recreational use statute did not apply to city owned land). See *Barrett, Good Sports and Bad Lands: The Application of Washington's Recreational Use Statute Limiting Landowner Liability*, 53 Wash. L. Rev. 1 (1977).

Other courts have grappled with the issue of who is an "occupier" in the context of recreational use statutes. One court found that a snowmobile club that groomed trails on public land owned by the U.S. Forest Service with permission of the Forest Service "occupied the trail with a degree of permanence," even though the club did not own or lease the land. *Smith v. Sno Eagles Snowmobile Club*, 823 F.2d 1193, 1197 (7th Cir. 1987). The court refused to interpret "occupant" as one in actual possession or exclusive control as that would be indistinguishable from owner and would negate the legislative intent to open up as much land as possible to recreation. *Id.* at 1198. *Accord*, *Mooney v. Royal Ins. Co. of America*, 476 N.W.2d 287 (Wis. Ct. App. 1991) (The court found a non-profit club liable for personal injuries following an accident on a temporary snowmobile race track on city property after finding the club not to be an occupant because "they had finished cleaning up and had left the premises with no intent to return.")

Black's Law Dictionary (6th ed. 1990) defines occupant as: "Person having possessory rights, who can control what goes on the premises. One who has actual use, possession or control of a thing." Possessory rights are acquired by an owner or lessee, of course, and thus entitled to protection of the recreational use statute; however, both the *Sno Eagle* court and the *Royal Ins. Co. of America* court found more transient interests to be within the ambit of the statute. Other transient interests which made their holders "occupiers" and thus entitled to the protection of recreational use statutes include special use permits, license to construct a dam, easement holders, a livestock grazing permit and other revocable licenses.<sup>24</sup>

Whether the Division or the counties will be considered "occupiers" for purposes of [NRS 41.510](#) when fencing abandoned mine sites may hinge on issues of actual use and control. Additionally, in all the cases cited, the occupiers who received the protection of the recreational use statute had a legal right to be there whether their right was a possessory interest in the land or non-possessory interest such as a license or easement. The Division's or the county's right to fence dangerous conditions on any land other than the states' must be superior to the right of the recreational user to also be there. A common law limitation on liability was provided to a possessor of land who had superior right as to a trespasser, but who may not have been the owner.<sup>25</sup> *O'Shea v. Claude C. Wood Co.*, 97 Cal. App. 3d 903, 911 (Cal. Ct. App. 1979) ([r]ule of nonliability may be successfully invoked by one who, although not the owner of the property on which the injury occurred, had rights therein superior to those of the trespasser who was injured . . . , " quoting from 65 C.J.S. *Negligence* § 63(21) (1966). Whether the definition of "possessor" and "occupant" are the same for purposes of fencing dangerous conditions at abandoned mine sites is not clear, but the cases cited above say that the dispositive issues are actual use and control.

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<sup>24</sup> The defendants in both *Sno Eagles Snowmobile Club*, and *Royal Ins. Co. of America*, had permission from the landowner to construct their respective projects. Although the cases do not say what form the permission took it is probable a permit was issued. In *Kantner v. Combustion Engineering*, 701 F. Supp. 943 (D. N.H. 1988) the court found the defendant to be an occupier based solely on construction activity pursuant to a license issued by a federal agency. The court focused on "possession and actual use of the premises" in defining "occupier." The California Supreme Court in *Hubbard v. Brown*, 50 Cal.3d 189, 785 P.2d 1183 (Cal. 1990) found that the holder of a permit to graze livestock on federal lands had sufficient interest in the land to be immune from liability under California's recreational use statute. The California statute, Civil Code § 846, was amended in 1980 to include any interest in land whether possessory or non- possessory. *Hubbard*, 50 Cal.3d at 194. The court said the amendment clearly meant to immunize private owners of easements and revocable licenses from tort liability to recreational users. *Id.* at 197. Please note that California's statute, § 846, was held by the California Supreme Court not to apply to public entities because it is irreconcilable with the provisions of the Tort Claims Act also dealing with recreational users of property. *Delta Farms Reclamation Dist. v. Superior Court*, 33 Cal.3d 699, 660 P.2d 1168 (Cal. 1983). In 1983, the California legislature amended the Tort Claims Act in response to *Delta Farms* and enacted a statute substantially similar to § 846 which expressly incorporates public entities and employees thus immunizing them from liability to recreational users. Government Code § 831.7.

<sup>25</sup> Restatement (Second) of the Law § 328E (1985) defines "Possessor of Land" as "(a) a person who is in occupation of the land with intent to control it."

Because fencing a dangerous condition is a clear indication of actual use and intent to control the premises, I conclude that fencing with the permission of the owner is sufficient to make one an occupant. [NRS 41.510](#).

Other limitations on the state's waiver of sovereign immunity from civil actions based on discretionary acts of its employees as found in [NRS 41.032](#) may not be applicable to the Division's program for fencing abandoned mine sites.<sup>26</sup> Discretionary acts or decisions are those typically made pursuant to policy such as whether or not to construct a controlled access highway. *State v. Webster*, [88 Nev. 690](#), 693, 504 P.2d 1316 (1972); *Nevada Power v. Clark Co.*, [107 Nev. 428](#), 429, 813 P.2d 477 (1991) (Municipality's decision not to place a traffic signal at a dangerous intersection is a discretionary act for which it is immune from liability). These cases also hold that once a decision to construct a highway or traffic signal is made, there attaches an obligation to use due care to make it reasonably safe for those who use it. The Division's decisions made when ranking the degree of hazardous conditions at abandoned mine sites are discretionary determinations based on standards issued by the Commission on Mineral Resources, but actual construction of a fence is also protected by [NRS 41.0331](#) which provides immunity for *any act or omission* in constructing a fence; therefore it appears the legislature has given the Division immunity for acts of negligence even when constructing the fence.

### CONCLUSION

Fencing done in the manner prescribed by regulation does satisfy the state's statutory requirements as found in [NRS 455.010](#), *et seq.* and [NRS 513.073](#), *et seq.* The Division or county may rely on the immunity protections found in [NRS 41.510](#) and [NRS 41.0331](#) when abandoned mine sites are fenced pursuant to permission or agreement with the landowner which gives the Division or county superior rights to occupy the site as to third parties.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: GEORGE H. TAYLOR  
Deputy Attorney General

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OPINION NO. 94-09 ADMINISTRATIVE AGENCIES; FINES AND PENALTIES: Unless an administrative agency delegates its disciplinary authority to hearing officer or panel, any fines or penalties imposed must be deposited with the State Treasurer for credit to the state general fund.

Carson City, May 20, 1994

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Except as provided in NRS 278.0233 no action may be brought under NRS 41.031 or against an immune contractor or an officer or employee of the state or any of its agencies or political subdivisions which is:

1. Based upon an act or omission of an officer, employee or immune contractor, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, if the statute or regulation has not been declared invalid by a court of competent jurisdiction; or
2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the state or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

Mr. Jerry Higgins, Executive Director, State Board of Registered Professional, Engineers and Land Surveyors, 1755 East Plumb Lane, Suite 135, Reno, Nevada 89502

Dear Mr. Higgins:

You have requested our opinion concerning the authority of the State Board of Registered Professional Engineers and Land Surveyors (Board) to use monies collected from fines and penalties assessed in disciplinary actions. Specifically, you ask when and under what circumstances do the provisions of Assembly Bill 235 (A.B. 235) now require the Board to deposit such monies into the state general fund rather than in the Board's own bank accounts.

### QUESTION

Must the Board deposit monies collected as fines or penalties in disciplinary actions into the state general fund, and later present a claim for reimbursement of its attorney's fees and costs of investigation under the following circumstances:

1. When the Board sits as the trier of fact and imposes fines and/or penalties at formal disciplinary hearings?
2. When the Board grants final approval to consent orders negotiated between Board staff and respondents that provide for the imposition of fines and/or penalties?
3. When the Board grants final approval to the recommendations of an Advisory Peer Review Committee that provide for the imposition of fines and/or penalties?

### BACKGROUND

A.B. 235 revamped the many outdated administrative fine and penalty statutes, increasing substantially the maximum fines that could be imposed by a number of state boards and commissions, among them the State Boards of Architecture, Chiropractic Examiners, and Nursing. Also included in A.B. 235 were procedural amendments to the administrative fine and penalty statutes which were necessary to satisfy the requirements of constitutional due process. Such procedural changes were mandated by a decision of the Nevada Supreme Court on the issue rendered after the original fine and penalty statutes were promulgated.

A.B. 235 did not increase the fines and penalties which could be imposed by the State Board of Professional Engineers and Land Surveyors; however, it explicitly altered the procedures the Board must follow regarding fines and penalties. A recounting and explanation of those changes form the substance of this opinion.

### ANALYSIS

A.B. 235 amended [NRS 625.150](#). The Board's powers enumerated in [NRS 625.150](#)(1) and (2) to deposit all monies collected by it in Nevada banks and to use such monies to meet the Board's expenses were qualified by the addition of subsections (5) and (6). New subsection (5) provides that the Board may delegate its authority to a hearing officer or panel to take any disciplinary action, to impose and collect fines, and to deposit such monies in Nevada banks. New subsection (6) provides that when the Board does not delegate its authority to take disciplinary action, the Board turns over any fines collected for deposit into the state general fund. Subsection (6) further provides that the Board may then present a claim to the state board of examiners "if money is needed to pay attorney's fees or the costs of an investigation, or both."

[NRS 625.150\(6\)](#) does not pose a clear command to the Board that it must turn over all fines and penalties to the state treasurer whenever it declines to delegate its disciplinary authority; in fact, the language seems to merely assume that the Board will do so. However, the case law that inspired the passage of A.B. 235, as discussed below, makes clear that absent a delegation of disciplinary authority, the Board is required to turn over all fines and penalties to the state treasurer.

The Board is a state agency funded solely by registration fees rather than tax revenues, and prior to the passage of A.B. 235 the Board was not required to deposit any of the monies it collected into the general fund. [NRS 625.110\(5\)](#) still specifically provides that the Board must support itself with the fees collected and that no part of the Board's expenses may be paid out of the state general fund. However, this is not dispositive of the issues raised by the Board's direct use of monies consisting of fines assessed in disciplinary proceedings. Plainly stated, the controlling principle expressed a number of times by the United States Supreme Court and recently by the Nevada Supreme Court is simply this: It is a violation of a respondent's right to due process if the body which takes disciplinary action stands to directly benefit financially from its decision.

The first question asks the result when the Board sits as fact-finder at a formal hearing and levies a fine on the respondent. This situation is clearly addressed by the new law and the Nevada Supreme Court decision which was the impetus of such change.

As the Nevada Supreme Court discussed in *Burleigh v. State Bar of Nevada*, [98 Nev. 140](#), 643 P.2d 1201 (1982), when an adjudicating body has direct responsibility for the financial condition of the body, and it is also the recipient of any fines and costs which it may levy as a result of disciplinary proceedings, constitutional standards are violated. Quoting the United States Supreme Court, the Nevada court explained that even in the absence of individual financial interest of the sitting board members, when a board has executive responsibilities for its finances, the board's natural interest in its level of income creates a temptation, or at least the appearance of, partisanship in the assessment of fines and the determination of their amount. *Id.* at 144 (citations omitted). Unquestionably, when the Board collects fines pursuant to a disciplinary hearing in which it sat as fact-finder, such monies must be deposited with the state treasurer for credit to the general fund.

Your second and third questions regard fines received pursuant to consent orders negotiated by the Board staff and pursuant to recommendations made by a Peer Review Advisory Committee. In the first case, you explained that the Board would retain final authority to approve or reject any proposed consent order. In the second case, you explained that the Board would retain the ultimate disciplinary authority, although the Peer Review Advisory Committee would hear the case and make recommendations to the Board, sometimes pursuant to a proposed stipulation agreed to by the respondent. In both of these cases it is less clear whether the Board is the body actually imposing the fines. After all, in the case of a consent order, the respondent agrees to the penalty, and in the case of an Advisory Board recommendation, the Advisory Board is the body which hears the case and ostensibly sits as fact-finder. In addition, both methods of resolving disciplinary cases are legitimate and even encouraged.

The Nevada Administrative Procedure Act (APA) authorizes the informal disposition of contested cases by stipulation, agreed settlement, consent order or default. See [NRS 233B.121\(5\)](#). The appointment of a panel to hear a disciplinary case is expressly authorized by [NRS 625.150](#) as amended. In addition, it is true that when a consent order is approved and entered or the Board confirms an advisory board's recommendation, accompanied by a stipulation or not, the Board does not conduct a hearing and sit as fact-finder. Nevertheless, it is an exercise of the Board's authority to take disciplinary action when it informally disposes of a contested case.

It is clear that in both scenarios discussed above, the Board does not "delegate its authority to take any disciplinary action," as is envisioned by the new provision of [NRS 625.150](#). In both cases, the Board must approve and confirm what amount to mere suggestions, as neither the Board staff nor the Advisory Committee has authority to make a final decision or take any disciplinary action. The case law and [NRS 625.150](#), as amended, clearly provide that delegation of disciplinary authority and the power to render a final decision is the prerequisite to any deposit of fines and penalties directly into the Board's accounts. Just as clearly, only the hearing officer or panel to whom such delegation is made is authorized to so deposit the fines into the Board's bank accounts.

### CONCLUSION

The legislature has granted broad disciplinary powers to the Board, the exercise of which has the potential to gravely affect constitutionally protected property rights of licensees. *See e.g. Gibson v. Berryhill*, 411 U.S. 564 (1973). One of the purposes of A.B. 235 was to bring the administrative disciplinary procedures of state agencies into line with contemporary standards of due process. Although the Board is not supported by money from the state general fund, it is an agency of the executive department of the State of Nevada and as such must accomplish its disciplinary functions within constitutional limits of due process and fairness.

If the Board does not delegate its authority to take disciplinary action to a hearing officer or panel which has power to render a final decision, any fines and penalties levied must be deposited with the state treasurer for credit to the general fund. The Board may recoup the costs of investigation and attorney's fees, however, by presenting a claim to the board of examiners.

If the Board delegates its disciplinary authority to a hearing officer or panel, the entire amount of any fines or penalties collected may be deposited into the Board's regular accounts. [NRS 625.150\(5\)](#) does not limit the amount authorized to be so deposited to the cost of attorney's fees and investigation. Therefore, monies collected as fines and penalties pursuant to disciplinary action taken by a hearing officer or panel may be used by the Board to meet the expenses of examinations, the expenses of issuance of certificates and the expenses of conducting the office of the Board, as provided by [NRS 625.150\(2\)](#).

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: RONDA L. MOORE  
Deputy Attorney General

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OPINION NO. 94-10 OPEN MEETING LAW: [NRS 281.541](#) provides a specific statutory exception to the open meeting law which allows a local ethics committee to render a confidential opinion to an elected city council person.

Carson City, May 24, 1994

Mr. Bradford R. Jerbic, Las Vegas City Attorney, City Hall, 400 East Stewart, Las Vegas, Nevada 89101

Dear Mr. Jerbic:

You have posed the following question.

## QUESTION

May an elected city councilperson request an opinion from a local ethics committee and have that request determined through a confidential process in light of the addition of [NRS 241.031](#) to the open meeting law?

## ANALYSIS

Nevada's ethics in government laws, including laws enabling the establishment of local ethics committees, are set forth in [NRS chapter 281](#). Nevada's open meeting law is set forth in [NRS chapter 241](#).

The open meeting law requires all meetings of public bodies to be public meetings *except as otherwise specifically provided by statute*. See [NRS 241.020](#). When it has deemed suitable to do so, the legislature has, from time to time, specifically provided for certain exceptions to the open meetings requirements. One of the subjects of specific exception from the general rule of open meetings has been legislated in the area of ethics law. See [NRS 281.511](#); [NRS 281.541](#); and *McKay v. Board of County Comm'r*, [103 Nev. 490](#), 746 P.2d 124 (1987).

[NRS chapter 281](#) provides for the creation of a state ethics commission. One of the duties of the state ethics commission is to render opinions interpreting the statutory ethical standards upon a given set of facts when requested to do so by public officers or employees.

"Public Officer" is defined within [NRS 281.4365](#)(1) as:

"Public officer" means a person elected or appointed to a position which is established by the constitution of the State of Nevada, a statute of this state or an ordinance of any of its counties or incorporated cities and which involves the exercise of a public power, trust or duty.

Based upon the above-described definition, an elected city councilperson would be considered as a "public officer" for purposes of application of the ethics in government laws. See Las Vegas City Charter §§ 1.040 and 1.050.

In addition to the state commission, [NRS 281.541](#) enables the creation of local ethics committees as follows:

1. Any department, board, commission or other agency of the state or the governing body of a county or an incorporated city may establish a specialized or local ethics committee to compliment the functions of the commission. Such a committee may:

(a) Establish a code of ethical standards suitable for the particular ethical problems encountered in its sphere of activity. The standards may not be less restrictive than the statutory ethical standards.

(b) Render an opinion upon *the request of any public officer* or employee of its own organization or level seeking an interpretation of its ethical standards on questions directly related to the propriety of his own future official conduct or refer the request to the commission. Any public officer or employee under such a committee shall direct his inquiry to that committee instead of the commission.

2. Such a committee shall not attempt to interpret or render an opinion regarding the statutory ethical standards.

3. *Each request submitted to a local ethics committee, each opinion rendered by a committee and any motion relating to the opinion is confidential unless:*

(a) The public officer or employee acts in contravention of the opinion; or

(b) The requester discloses the content of the opinion. [Emphasis added.]

The City of Las Vegas has established a local ethics committee as provided for in [NRS 281.541](#). The question at hand is whether elected city councilpersons may receive confidential ethics opinions from such a committee if they so choose.

The legislative history regarding [NRS 281.541](#) reflects that any public officer requesting an opinion from a local ethics committee is entitled to confidentiality on the opinion. The scope of confidentiality covers the public officer's request, the content of the opinion and any motion of the ethics committee relating to the opinion. As set forth in [NRS 281.4365](#) such a request could be made by an elected public officer. The public officer would only lose confidentiality regarding the opinion rendered if that person failed to follow the advice given or if the person chose to disclose the content of the opinion.

Thus, absent a conflicting statute, we conclude that an elected city councilperson could make a request for an ethics opinion and the local ethics committee could proceed in a closed meeting exempt from the open meeting law in order to resolve the request. The final question is whether the legislature's enactment of [NRS 241.031](#) in 1993 changes the result set forth above. That statute sets forth:

A public body shall not hold a closed meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of an elected member of a public body.

The legislative history on [NRS 241.031](#) reflects that the statute was enacted so that elected officials would not be subject to criticism from fellow board members in a closed personnel setting. The sponsors of the bill including this statute stressed in legislative committee hearings that elected members of public bodies should only have their fate decided by voters at the ballot box and not by fellow board members. [NRS 241.031](#) is in effect an exception to the exception set forth in [NRS 241.030](#).

When the legislature added [NRS 241.031](#) to the law it failed to alter or repeal the confidentiality provision for local ethics committees set forth in [NRS 281.541](#). The exception set forth in [NRS 281.541](#) is an independent open meeting law exception not related to [NRS 241.030](#). Thus on the subject matter of ethics, we conclude that the legislature intended to continue to hold elected persons accountable to a local ethics committee and not just to the voters. At the same time the legislature intended to provide privacy for the elected public officer regarding any ethics opinion requests made to a local committee.

The rules of statutory construction support the conclusion discussed above. For instance, if a reasonable statutory construction allows, statutes relating to the same subject must be harmonized to effectuate the intent of each. *See Weston v. County of Lincoln*, [98 Nev. 183](#), 643 P.2d 1227 (1982); *State v. Rosenthal*, [93 Nev. 36](#), 559 P.2d 830 (1977). We believe that the ethics provision and the open meeting law provision can be harmonized because they deal with two distinct types of proceedings. The ethics committee's closed proceeding on an opinion request from an elected public officer would be permissible. Any other type of closed discussion by a public body regarding an elected person's character, competence, alleged misconduct or health would not be permissible.

Even if a court were to determine that [NRS 281.541](#) and [NRS 241.031](#) are directly in conflict, the principle of statutory construction regarding specific versus general statutes would lead to the same result. The specific confidentiality provision for a local ethics committee should control for that public body over the more general open meeting law provision. *See State Indus. Ins. Sys. v.*

*Surman*, [103 Nev. 366](#), 368, 741 P.2d 1351 (1987); *Laird v. Nev. Pub. Employees Retirement Bd.*, [98 Nev. 42](#), 639 P.2d 1171 (1982).

### CONCLUSION

An elected city councilperson may request an opinion from a local ethics committee and have that request determined through a confidential process pursuant to the independent statutory exception to open meeting law requirements set forth in [NRS 281.541](#). [NRS 241.031](#) has no application to such a request since an ethics opinion request is based upon an independent exception to the open meeting law and not the character, competence, alleged misconduct and health exception set forth in [NRS 241.030](#).

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: ROBERT L. AUER  
Senior Deputy Attorney General

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OPINION NO. 94-11 CORPORATIONS; SECRETARY OF STATE: The term "deceptively similar" as it is used in the statutes governing corporations, limited liability companies and limited partnerships can be determined by using the following general rule: is the similarity of the names such as to mislead a person of average intelligence.

Carson City, May 25, 1994

The Honorable Cheryl A. Lau, Secretary of State, Capitol Complex, Carson City, Nevada 89710

Dear Ms. Lau:

You have requested an opinion from this office regarding the term "deceptively similar" as it applies to private, nonprofit, close, professional, and foreign corporations, as well as limited liability companies and limited partnerships.

### QUESTION

What does the term "deceptively similar" mean as it is used in the statutes governing private, foreign, nonprofit, close, and professional corporations, as well as limited liability companies and limited partnerships?

### ANALYSIS

The Secretary of State is prohibited from filing the articles of incorporation of a business entity if its name is "deceptively similar" to the name of another business entity on file in the Secretary of State's office. You are asking for guidelines as to what is a deceptively similar name. The courts in many states have struggled with this very issue for many years.

[NRS 78.039](#) states as follows:

1. The secretary of state shall refuse to accept for filing the articles of incorporation of any corporation whose name is the same as or *deceptively similar* to the name of a

corporation, limited partnership or limited-liability company existing under the laws of this state or a foreign corporation, foreign limited partnership or foreign limited-liability company authorized to transact business in this state, or a name to which the exclusive right is, at the time, reserved in the manner provided under the laws of this state, unless the written acknowledged consent of the holder of the registered or reserved name to use the same name or the requested similar name accompanies the articles of incorporation.

2. For the purposes of this section, a proposed name is not distinguished from a registered or reserved name solely because one or the other contains distinctive lettering, a distinctive mark, a trade-mark or a trade name or any combination of these. [Emphasis added.]

Chapters 82, 78A, 89, 80, 86, and 88 of the NRS, which pertain to nonprofit, close, professional, and foreign corporations, limited liability companies and limited partnerships, contain sections which make [NRS 78.039](#) applicable to those particular business entities.

Many states have similar provisions, provisions that prohibit confusingly similar names, or provisions that prohibit filing a name which is likely to mislead or to be misleading. The public policy behind these provisions is to protect "the public right not to be misled by identical or similar corporate names," *National Shoe Corp. v. National Shoe Mfg. Co., Inc.*, 19 N.E.2d 734, 735 (Mass. 1939), and "to avoid deception in the use of similar names, 'this protection . . . is primarily for the benefit of the public generally.'" *Guardian Life Ins. Co. v. Guardian Nat'l Life Ins. Co.*, 184 F. Supp. 851, 853 (E.D. La. 1960).

It is "the duty of the Secretary of State to exercise his judgment and discretion" in determining which names are deceptively similar. *State ex rel. Collins v. Howell*, 141 P. 1157 (Wash. 1914). "It is his duty only to inquire into the similarity of the names, and if, in his judgment, the names so nearly resemble each other as to be misleading, it is his duty to reject the offered articles of incorporation." *Id.* at 1158. "The section [of the California law prohibiting filing misleading names] vests in him [the Secretary of State] a certain discretionary power which he may be compelled to exercise." *Cranford v. Jordan*, 61 P.2d 45, 46 (Cal. 1936). "[T]he question of distinguishableness would rest largely in the secretary's discretion. . . . [T]he Secretary of State has only one statutory duty: to ensure, in the exercise of his discretion, that a new corporate name can be distinguished on the records of the Division of Corporations from those names previously registered." *Trans-Americas Airlines, Inc. v. Kenton*, 491 A.2d 1139, 1142 (Del. 1985). The statute provides that:

[N]ames of corporations shall not be so similar as to mislead the public dealing with them. . . . It simply leaves to the administrative or ministerial board charged with the duty of passing upon such matter the determination of similarity of names when the question arises in the course of administrative duty.

*Board of Ins. Comm'rs v. National Aid Life*, 73 S.W.2d 671, 674 (Tex. Ct. App. 1934).

The Secretary of State has the authority to make the determination of whether the name of a business entity attempting to file in your office is deceptively similar to the name of a business entity already on file. To help in making this determination, many courts have offered various rules to follow, although the courts concede that "[i]t is difficult to state a precise rule by which one name may be said to be an imitation of another." *State ex rel. Hutchison v. McGrath*, 5 S.W. 29, 30 (Mo. 1887); *National Bank in N. Kansas City v. Bank of N. Kansas City*, 172 S.W.2d 967, 969 (Mo. 1943).

The most commonly used rule states as follows:

The test of the statute is that the confusion must be such as would exist in the mind of a person of ordinary intelligence, and it is not sufficient that careless and indifferent readers

of names would be confused as to the identity of corporations. *Young & Chaffee Furniture Co. v. Chaffee Brothers Furniture Co.*, 204 Mich. 293, 170 N.W. 48. [Italics added.]

*Metal Craft Co. v. Metalcraft Heater Corp.*, 239 N.W. 364, 365 (Mich. 1931). A later Michigan court applied "the following standard: 'Whether the two names would be deceptive or misleading in the minds of ordinary persons with ordinary intelligence.'" *Educational Subscription Serv., Inc. v. American Educational Services, Inc.*, 320 N.W.2d 684, 686 (Mich. Ct. App. 1982). "The test which this court has applied in determining whether the right of a corporation under the statute in question has been violated is this: is the similarity of the names such as to mislead a person of average intelligence?" *National Shoe Corp.*, 19 N.E.2d at 735. "[T]he test here is the likelihood of public deception or confusion." *Guardian Life Ins. Co.*, 184 F. Supp. at 854. "[T]he general principle . . . is [whether] the corporate names are identical or so similar that persons using due care and caution, such as the public generally are capable of using, would likely be deceived and misled by the similarity." *National Bank in N. Kansas City*, 172 S.W.2d at 971.

Reviewing several court holdings will establish specific rules to help in the development of a specific policy in the Secretary of State's office. In 1887 the Supreme Court of Missouri found that the names "Kansas City Real-Estate Exchange" was substantially the same as "Kansas City Real-Estate & Stock Exchange" for the reason that the omission of the words "and stock" did not furnish a fair distinguishing feature. *Hutchison*, 5 S.W. at 30-31. In 1914 the Supreme Court of Washington agreed with the Washington Secretary of State that the proposed name "Kennewick Fruit Exchange" resembled the following names too closely and was therefore refused: "Kennewick Fruit-Land Company;" "Kennewick District Fruit Growers' Association;" and "Kennewick Fruit & Produce Company." *Howell*, 141 P. at 1157.

The Supreme Court of Minnesota in 1919 found that the names "Thompson Lumber Co." and "Thompson Yards, Inc." do not look alike and are sufficiently dissimilar in appearance and sound so that the law was not violated. *Thompson Lumber Co. v. Thompson Yards, Inc.*, 175 N.W. 550, 551 (Minn. 1919). The Supreme Court of Michigan in 1931 refused to allow "Metalcraft Heater Corporation" since the probability of confusion is apparent with the existing name, "Metal Craft Co." The court stated:

The term "Metal Craft," whether used as two words in sequence or as one word, while not subject to exclusive appropriation, is sufficiently distinctive to stand out in a corporate name. It has an attractive sound, carrying an implication of skill and, perhaps, artistry in metal working. It is more outstanding than more commonly used terms, and its use by two corporations is more likely to produce confusion of names, unless qualified by other words which emphasize the difference in identity.

*Metal Craft Co.*, 239 N.W. at 365. The court goes on to explain that placing the name of a city before the words "Metalcraft" would distinguish the names of the two corporations. *Id.* at 366.

Many other courts have also ruled on this issue, for example, in *Board of Insurance Commissioners* the Court of Civil Appeals of Texas in 1934 found that the names "National Aid Life" and "National Aid Life Association" were too similar. *Board of Ins. Comm'rs*, 73 S.W.2d at 674. In *Cranford* the Supreme Court of California in 1936 found that the names "Transamerica Corporation" and "Transamerica Service Corporation" were likewise too similar. *Cranford*, 61 P.2d at 47. The Supreme Court of Massachusetts in 1939 decided that "National Shoe Corporation" and "National Shoe Manufacturing Co., Inc." were not confusingly similar. *National Shoe Corp.*, 19 N.E.2d at 735. In 1943 the Kansas City Court of Appeals decided that "National Bank in North Kansas City" and "Bank of North Kansas City" were different names. *National Bank in N. Kansas City*, 172 S.W.2d at 969.

In 1952 the Supreme Court of Minnesota held that "Howard Clothes of New York, Inc." was not so confusingly similar to "Howards Clothes, Inc." as to mislead an ordinary purchaser. The court reasoned that a "subsequent user [could] accompan[y] the name with a distinguishing legend—or with some other appropriate explanation or device—which w[ould] eliminate any reasonable likelihood that the ordinary purchaser will mistake the subsequent user's goods for those of the prior user." *Howards Clothes, Inc. v. Howard Clothes Corp.*, 52 N.W.2d 753, 759 (Minn. 1952). The court went on to state "[t]he distinguishing legend to be effective must be sufficiently striking in appearance or effect to distinguish defendant's name from that of plaintiff not only when the two names are in juxtaposition, but also when that are seen apart from each other as they are normally used in the trade." *Id.* at 759-60. The words "of New York" fit the criteria for such a distinguishing legend.

In 1960 the U.S. District Court for the eastern district of Louisiana held that the name "Guardian National Life Insurance Company" was not deceptively similar to "Guardian Life Insurance Company of America." The court reached this conclusion after examining the business activities of each corporation. *Guardian Life Ins. Co.*, 184 F. Supp. at 854.

In 1982 the Court of Appeals of Michigan in *Educational Subscription Service* provided guidelines for determining if corporate names are confusingly similar. "Subject to two exceptions, corporate names are *not* confusingly similar when only one of the first two words of the names is the same." *Educational Subscription Serv.*, 320 N.W.2d at 689. "The first exception is as follows: where one or more words of the plaintiff's corporate name has acquired a 'secondary meaning' (defined as a meaning which would in and of itself serve to identify plaintiff with that word regardless of the context in which it is used)." *Id.* "The second exception applies when the first word of each corporate name is identical and particularly prominent or distinctive and, in addition, the third word of one company's name is the same as the second or third word of the other company's name." *Id.* The court then offered the following principle: "where no word in a plaintiff's corporate name has acquired a secondary meaning, the names of two corporations are not confusingly similar if the first word in each corporate name is obviously different." *Id.*

In 1985 the Supreme Court of Delaware upheld the decision of the Secretary of State in his "determination that the name, 'Transamerica Airlines, Inc.,' is distinguishable from the name, 'Trans-Americas Airlines, Inc.,' on the records of the Division of Corporations." *Trans-Americas Airlines*, 491 A.2d at 1143. The Court of Appeals of Wisconsin in 1987 held that the name "First Realty, Inc." was not deceptively similar to the name "First Realty Group, Inc." *First Realty Group, Inc. v. First Realty, Inc.*, 415 N.W.2d 557, 558 (Wis. Ct. App. 1987).

The Court of Appeals of Maryland in 1988 examined regulations entitled "Criteria Used in Determining Acceptability of Corporate Name" specifically addressing comparing the names of different business entities, such as, corporations and limited partnerships. One regulation required dropping the words of incorporation, also known as the "tails," from the corporate names and comparing the resulting names. Thus, "Waverly, Inc." was the same as "Waverly Limited Partnership." The court found this regulation to be a violation of the Maryland statute and stated as follows:

By mandating that the name of a corporation indicate it is a corporation and that the name of a limited partnership indicate it is a limited partnership, the General Assembly has necessarily concluded that those designations in an organization's name have significance to members of the public dealing with one or the other form of business organization.

*Waverly Press, Inc. v. State Dep't of Assessments & Taxation*, 539 A.2d 223, 228 (Md. Ct. App. 1988).

Many of the court decisions cited above rely on information not available to the Secretary of State, such as the type and location of the business and evidence of the presence or absence of actual confusion by the public. *First Realty Group*, 415 N.W.2d at 558 and *Howards Clothes*, 52 N.W.2d at 757. However, it is still possible for the Secretary of State to adopt a policy which will clarify for staff and the public those guidelines used to determine if a name is deceptively similar to another name. This office will provide guidance in the development of that policy and it is our suggestion that the policy be made into a regulation after the appropriate changes would be made in the next legislative session.

The courts consistently confer great deference to the determination of the Secretary of State in this matter. *Trans-Americas Airlines*, 491 A.2d at 1142, *Cranford*, 61 P.2d at 46, and *Howell*, 141 P. at 1158. So it therefore is very important for the Secretary of State to have written guidelines to help determine what names are deceptively similar to names already on file in the Secretary of State's office.

### CONCLUSION

The term "deceptively similar" as it is used in the statutes governing private, foreign, nonprofit, close, and professional corporations, as well as limited liability companies and limited partnerships can be determined by using the following general rule: is the similarity of the names such as to mislead a person of average intelligence.

The following specific rules will help in implementing this general rule:

1. The addition of a geographical "legend" will distinguish one name from another. This legend may be the name of a region, state, city, or town or may be a direction, such as north or south.
2. Changing the order of the words of a name will distinguish one name from another.
3. Adding punctuation, changing spelling of one or all of the words in the name, or adding an "s" to one or all of the words in a name, will *not* distinguish one name from another.
4. Nevada law, unlike Maryland law, does not require that all corporate names include a word of incorporation, therefore drop the word or words of incorporation and compare the resulting name to those names on file.
5. If only one of the first two words of a names being compared is the same, the names are distinguishable with the following two exceptions: a. one or more of the words in the name on file has acquired a "secondary meaning" (defined as a meaning which would in and of itself serve to identify the filed name with that word regardless of the context in which it is used), b. the first word of each name is identical and particularly prominent or distinctive and, in addition, the third word of one name is the same as the second or third word of the other name.

It is the suggestion of this office that the Secretary of State adopt a written policy to implement these rules based upon this opinion and also add other rules and/or procedures as needed and give notice of the same as appropriate, i.e. including this information in office mailings and through other means to inform the public.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: KATERI CAVIN  
Deputy Attorney General

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OPINION NO. 94-12 CHILD SUPPORT; PATERNITY: Under [NRS 440.280](#)(6) and 126.051(3), a man who is the biological father of a child cannot use a paternity affidavit signed by another man as a legal defense to avoid a support order.

Carson City, May 26, 1994

Mr. J. Michael Memeo, Elko County Deputy District Attorney, 575 Court Street, Elko, Nevada 89801

Dear Mr. Memeo:

You have requested an opinion regarding the construction of the statutory language in [NRS 440.280](#)(6) and [NRS 126.051](#)(3). In preparation for this opinion, contributions from your office and other interested persons were solicited by this office for consideration. An assumption is made for the purposes of this opinion that both the mother and father signed the affidavit acknowledging the paternity of the child. This assumption is necessary for the application of the conclusive presumption under [NRS 440.280](#)(6).

#### QUESTION

Is a biological father relieved of his duty and obligation to pay child support by a man executing a paternity affidavit under [NRS 440.280](#)(6) which designates that man as the legal father on the birth certificate?

#### BACKGROUND

The Four Seas test is the original conclusive presumption of paternity. "If a husband, not physically incapable, was within the four seas of England during the period of gestation, the court would not listen to evidence casting doubt on his paternity."<sup>27</sup> The policies supporting that presumption were to preserve the integrity of the family, the supposed virtue of the mother, and protect the innocent child from the social and legal stigma of illegitimacy.<sup>28</sup> However, because of the growing reality of multiple meretricious unions during the initial gestation period, there appears little reason to apply the presumption based on those policies in these particular cases. The case of *In Re Findlay*, 170 N.E. 471 (1930) deals with the issue of presumption in establishing paternity in out-of-wedlock cases. Justice Cardozo eloquently states in his opinion the problems in blindly following the presumption:

What is meant by these pronouncements, however differently phrased, is this, and nothing more, that the presumption will not fail unless common sense and reason are outraged by a holding that it abides. . . . The presumption does not consecrate as truth the extravagantly improbable, which may be one, for ends juridical, with the indubitably false.

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<sup>27</sup> *In Re Findlay*, 170 N.E. 471, 472 (1930).

<sup>28</sup> *County of Orange v. Leslie B.*, 17 Cal. Rptr. 2d 797, 799 (Cal. Ct. App. 1993); 10 Am. Jur. 2d *Bastards* § 10 (1963). See *Michael H. et al. v. Gerald D.*, 491 U.S. 110, 125 (1989).

*Id.* at 473.

When Justice Cardozo opined this case, blood tests and genetic tests did not exist, so there was no objective proof as to a child's real paternity. The court was forced to rely on subjective and biased testimony of the parties involved regarding possible paternity. The strong presumption in favor of paternity in most cases allowed the court to avoid the sordid and intimate details of the parties, as well as balancing the witnesses' credibility. The legitimacy presumption still performs those commendable purposes today, even when the issue of access, development of blood tests, and perfection of blood tests by genetic advances are used to rebut the presumption. However, the presumption of legitimacy should not roll over the truth and perpetuate a falsehood, especially when the traditional reasons for the presumption are not served.<sup>29</sup>

### ANALYSIS

[NRS 440.280](#)(6) is contained within the chapter of NRS governing vital statistics. The statute establishes a procedure whereby a "father" and mother may sign a paternity affidavit that places his name on the birth certificate as legal father of the child. In 1911, the Nevada Legislature passed a law that is the progenitor of today's statute. The statute was amended in 1983 to read: "If both the mother and father execute an affidavit acknowledging paternity, the presumption of paternity is conclusive if the acknowledgment is not revoked or rescinded within 6 months after the filing with the state registrar . . . ."

The conclusive presumption of paternity contained in chapter 440 of NRS is clearly for purposes of registering birth with the state registrar and is not contained within chapter 126 of NRS governing establishment of paternity. [NRS 126.051](#)(2)(c) references chapter 440 of NRS *only* for purposes of documentation of the birth, not to include the conclusive presumption in [NRS 440.180](#). *Weston v. County of Lincoln*, [98 Nev. 183](#), 185, 643 P.2d 1227, 1229 (1982) (obligation to render compatible whenever possible); *State v. Rosenthal*, [93 Nev. 36](#), 45, 559 P.2d 830, 836 (1977) (obligation to render statutes compatible). The absence of the conclusive presumption mentioned in chapter 126 of NRS demonstrates that this presumption is intended only to apply to vital statistics. If vital statistics is to apply this presumption for purposes related to the birth certificate, then it must be in the form of an acknowledging affidavit signed by both the mother and father. The language, on its face, pertains to vital statistics in issuing birth certificates to prevent an acknowledging father from repudiating paternity of the child after six months passes from the date of acknowledging paternity.

Vital statistics has an interest in the repudiation of paternity for reasons of conferring finality on the birth certificate, and preventing illegitimizing the child. The presumption is not intended to establish responsibility for child support. This statutory construction indicates the purpose for the presumption as being one connected with the purposes of vital statistics, not adding a new presumption to chapter 126 of NRS. Therefore, a biological father's attempt to use the presumption in chapter 440 as a shield to avoid paying child support or avoid a court determination of paternity is misplaced.

[NRS 440.280](#) must be read to give effect to all provisions of the statute. *K.L.B. Inc. v. Second Judicial Dist. Court*, [103 Nev. 473](#), 476, 745 P.2d 700, 702 (1987); *McCrakin v. Elko County School District*, [103 Nev. 655](#), 658, 747 P.2d 1373, 1375 (1987); *Colello v. Administrator, Real Estate Div.*, [100 Nev. 344](#), 347, 683 P.2d 15, 16 (1984) (intent from entire act as a whole in light of its purpose).

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<sup>29</sup> *B. v. Ben*, 334 N.Y.S.2d 229, 233 (N.Y. Fam. Ct. 1972).

"The name of the father may not otherwise appear on the original certificate of birth unless paternity has been determined by a court of competent jurisdiction." [NRS 440.280\(6\)](#). "If a determination of paternity has been made by a court of competent jurisdiction, the name of the father as determined by the court must be entered on the certificate." [NRS 440.280\(7\)](#). This statutory language specifically addresses the issue of paternity only for the purposes of the birth certificate. If a biological father were permitted to hide behind this presumption of paternity, a paternity action brought under [NRS 126.022](#), *et seq.* could not proceed where there is an acknowledging father. This does not give effect to the language in [NRS 126.051\(2\)](#) and (3). [NRS 126.051\(2\)](#) states:

If another man is presumed under this section to be the child's father, acknowledgment of paternity may be effected only with written consent of the presumed father or after the *presumption has been rebutted by court decree*. Acknowledgment by both parents as to the parentage of the child makes the child legitimate from birth, and the birth must be documented as provided in chapter 440 of NRS. [Emphasis added.]

A court must be able to rebut the presumption in [NRS 440.280\(6\)](#), otherwise the emphasized language above is meaningless. It is important to note that this statute was amended in 1983 by the same law that amended [NRS 440.280](#). The connection between the two was apparent to the legislature, and does not cause a conflict in the statutes by legislative oversight, nor by subsequent amendments. *Life Ins. Co. of N. America v. Wollett*, [104 Nev. 687](#), 690, 766 P.2d 893, 895 (1988). Additionally, chapter 440 of NRS does not define "father," but reading [NRS 440.280\(6\)](#) and [NRS 126.051\(2\)](#) together indicates the "man" presumed to be the father in [126.051\(2\)](#) is the "father" in [440.280\(6\)](#). Thus, the language in [NRS 126.051\(2\)](#) indicates again the importance of making the child legitimate, but is not concerned with the responsibility for child support.

Finally, in [NRS 126.051\(3\)](#), the legislature allows the courts to rebut a presumption. [NRS 126.051\(3\)](#) states:

A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumption arise which conflict with each other, the presumption which on the facts is founded on the weightier consideration of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

If [NRS 126.051\(3\)](#) is to have any meaning when read in conjunction with [NRS 440.280\(7\)](#), then the presumption contained in [NRS 440.280\(6\)](#) must yield to a clear and convincing standard of proof established under [NRS 126.051\(3\)](#).

In the case *County of Orange v. Leslie B.*, 17 Cal. Rptr. 2d (Cal. Ct. App. 1993) a biological father attempted to use a conclusive presumption in a paternity action filed by the local district attorney to avoid paying child support. The mother of the child was married to the legal father at the time of conception. The mother, while still married, became involved in a sexual relationship with the biological father. The biological father claimed that the conclusive presumption, used for a child conceived during the marriage, prevented the court or district attorney from declaring he was the father. The court held the presumption is not designed to state responsibility for child support, and would not apply the presumption to purposely avoid any responsibility for the child. In this case the presumption directly related to the establishment of paternity. However, the court refused to follow the presumption when to apply it "is to rely upon a fiction to establish a legal fact which we know to be untrue, in order to protect policies which in this case do not exist." *Id.* at 801.

In *Libro v. Walls*, [103 Nev. 540](#), 746 P.2d 632 (1987), the court allowed an ex-husband to contest paternity of a 4-year-old child born during a marriage, even though presumably the birth

certificate listed him as the father. Additionally, the father contested paternity after entry of a decree of divorce naming him as father of the child, and after paying thirteen months of child support. The court stated the facts were egregious because the parties were married, and the mother had a duty to disclose to the father there was an issue of his paternity. *Id.* at 542. See *Masters v. Worsley*, 777 P.2d 499 (Utah 1989).

If an unrelated man was unaware of the issue of paternity, then he could cut off his obligation of support under *Libro*. In the instant case, under the reasoning of *Libro*, the father named in the birth certificate could challenge his paternity for extrinsic fraud. If the biological father's defense of conclusive presumption in the birth certificate stands, then the consequences would mean the child would have no father, no inheritance, and no support. That type of result is not what the legislature intended when it amended the language in [NRS 440.280\(6\)](#), and certainly is not in the best interest of the child.

The legislature established the ability of the state to prosecute paternity actions to protect the best interest of the child. When Nevada adopted the Uniform Parentage Act, it accepted as a matter of public policy the intentions behind the Act. *Nevada State Dep't of Motor Vehicles v. Turner*, [89 Nev. 514](#), 517, 515 P.2d 1265, 1266 (1973). The preamble of the Act states:

Whereas, the parent and child relationship, with its rights, privileges, duties and obligations, extends equally to every child and to every parent regardless of marital status of the parents, and it is the duty of the state to establish means to protect and enforce these interests. . . . (NRS Revisors Notes beginning of ch. 126).

In *Matter of Marriage of Ross*, 783 P.2d 331, 336 (Kan. 1989) a court stated the Act was to provide for the "equal, and beneficial treatment of children." Many courts agree the Act requires a court to act in the best interest of the child, which is likely to be persuasive in this state. *Securities Inv. Co. v. Clark*, [89 Nev. 341](#), 347 n.6, 513 P.2d 1238, 1242 n.6 (1973); *Gambis v. Morgenthaler*, [83 Nev. 90](#), 96, 423 P.2d 670, 674 (1966). See *Mak-M v. SM*, 854 P.2d 64 (Wyo. 1993); *Jensen v. Runft*, 843 P.2d 191, 193 (Kan. 1992); *Matter of Paternity of JRW*, 814 P.2d 1256 (Wyo. 1991); *Ban v. Quigley*, 812 P.2d 1014 (Ariz. Ct. App. 1990). Therefore, the presumptions of [NRS 126.051](#) are to be balanced along with the best interests of the child. See [NRS 126.141](#) where the judge or master shall evaluate whether a judicial declaration of the relationship would be in the best interest of the child. The child's best interests are not promoted by the biological father's ability to avoid his responsibility under the situation presented.

## CONCLUSION

The "conclusive presumption" of paternity cannot be raised as a defense to payment of child support by the biological father. The historical basis and statutory basis for the presumption was to protect the unity of the family and the filial relationships. These bases are not applicable in the situation presented in the opinion request. Further, statutory construction requires that the "conclusive presumption" contained in [NRS 440.280\(6\)](#) is rebuttable by the clear and convincing evidence standard contained in [NRS 126.051\(3\)](#). Finally, if the biological father's defense is allowed to stand, then the best interests of the child would not be served. Accordingly, under [NRS 440.280\(6\)](#) and [126.051\(3\)](#), a paternity affidavit signed by another man may not be used by the child's biological father as a legal defense to avoid a support order.

FRANKIE SUE DEL PAPA  
Attorney General

By: DONALD W. WINNE, JR.  
Deputy Attorney General

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OPINION NO. 94-13 CRIMINAL LAW; PAROLE AND PROBATION: Consistent with statutory and constitutional law, recertification by the sexual offense psychiatric panel of certain specified offenders may be required before an offender may be deemed eligible for parole. Recertification may be required by the Parole Board when intervening misconduct or newly acquired information indicates a previous certification may have been improvidently rendered, or when the previous certification was not rendered within one year of the offender's parole application hearing.

Carson City, September 29, 1994

Mr. Karl Sannicks, Acting Director, Nevada Department of Prisons, Post Office Box 7011, Carson City, Nevada 89702

Dear Mr. Sannicks:

You have requested an opinion concerning whether recertification by the sexual offense psychiatric panel (psych panel), referred to in [NRS 200.375](#), [201.190](#), 201.195, 201.210, 201.220, 201.230 and 201.450, may be required of certain offenders.<sup>30</sup> Specifically, you note that Lupe Gunderson, Chairwoman of the Nevada Board of Parole Commissioners, has proposed that offenders whose parole applications have been denied for a period equal to or greater than one year, and offenders who incur a prison disciplinary conviction following a successful psych panel certification, be required to be recertified by the psych panel before being deemed eligible for parole.

#### QUESTION

May recertification by the sexual offense psychiatric panel referred to in [NRS 200.375](#), [201.190](#), 201.195, 201.210, 201.220, 201.230 and 201.450, be required of certain offenders?

#### ANALYSIS

Each of the above statutes contains identical language which provides that an offender may not be paroled unless a psych panel "certifies that the person so convicted was under observation while confined in an institution of the department of prisons and is not a menace to the health, safety or morals of others." *See, e.g., NRS 200.375.*<sup>31</sup> None of these statutes specify whether a successful psych panel certification is valid in perpetuity, or whether an offender whose parole application is denied must be recertified before being deemed eligible for parole on a subsequent parole application. Because the statutes are silent on this issue, the Department of Prisons and the Parole Board have treated psych panel certifications as nonexpiring, and have not required offenders to be recertified.

Initially, it is noted that Nevada's parole statutes do not create a reasonable expectancy of release on parole and thus do not give rise to a constitutionally cognizable liberty interest sufficient to invoke the requirements of due process. *Kelso v. Armstrong*, 616 F. Supp. 367, 369 (D. Nev. 1985) (*citing Baumann v. Arizona Dept. of Corrections*, 754 F.2d 841, 844 (9th Cir. 1985),

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<sup>30</sup> The psych panel certification requirement set forth in NRS 201.190 was repealed, effective July 1, 1977, by Act of May 20, 1977, ch. 598, § 17, 1977 Nev. Stat. 1632.

<sup>31</sup> NRS 201.450 does not require a certification that the offender was under observation while confined, but does include the requirement that a psychiatrist or psychologist certify the offender as "not a menace to the health, safety or morals of others."

*Severance v. Armstrong*, [96 Nev. 836](#), 839, 620 P.2d 369, 370 (1980), and *Weakland v. Board of Parole Comm'rs*, [100 Nev. 218](#), 219-20, 678 P.2d 1158, 1160 (1984)). A Nevada offender does, however, have a constitutionally protected right to apply for parole. *Kelso*, 616 F. Supp. at 369 (citing *Severance v. Armstrong*, [97 Nev. 95](#), 96, 624 P.2d 1004, 1005 (1981)). Consequently, because psych panel certification is a prerequisite to parole eligibility and a required part of the parole application process for specified offenders, an offender's interest in maintaining his or her psych panel certification and consequent parole eligibility is constitutionally protected. Such certification therefore may not be arbitrarily rescinded without violating an offender's right to due process.

In the case of a parole applicant who has committed no intervening misconduct following a relatively recent and successful psych panel certification, who has not evidenced any psychological deterioration following such certification, and about whom no additional relevant information has become available, the Parole Board's practice of not requiring recertification is reasonable. This is because, in the absence of such intervening misconduct, psychological deterioration or revelations of material fact concerning an offender's mental condition or personal history, there is nothing to call the previous psych panel certification into question. Under these circumstances, it would be anomalous and thus arbitrary for a psych panel to deny recertification to an offender who recently has obtained such certification.

Conversely, however, intervening misconduct, evidence of psychological deterioration, or receipt of new information about an offender following a successful psych panel certification, raises legitimate and reasonable concerns as to the propriety of the psych panel's previous certification. The existence of such circumstances thus provides a rational, legitimate, and nonarbitrary basis for rescinding a previous certification and requiring a recertification. Rescission of a previous certification under such circumstances would therefore not result in a violation of an offender's due process right not to have the certification arbitrarily rescinded.

Support for this conclusion is found in California's statutory and regulatory scheme, where rescission of a decision to grant parole prior to actual release may be justified based upon disciplinary conduct, psychological deterioration, or newly acquired information which indicates that parole should not be granted. Cal. Code Regs. tit. 15, § 2451(a)-(c) (1994); *In re Fain*, 188 Cal. Rptr. 653, 659 (Cal. Ct. App. 1983). This conclusion is further supported by the Ninth Circuit Court of Appeals decision in *Kelch v. Director, Nevada Dept. of Prisons*, 10 F.3d 684 (9th Cir. 1993), where the court concluded that rescission of a pardons board commutation did not violate appellant's substantive due process rights because the state had received insufficient notice of the initial hearing and new information adduced on rehearing militated against the decision to grant a pardon.

Intervening misconduct, or receipt of new information about an offender's mental condition or personal history which would indicate that certification should not be made, provide fairly obvious bases for questioning a previous psych panel certification and requiring a recertification. Less obvious is the fact that the passage of time following a psych panel certification entails the possibility of an offender's psychological deterioration, and thus also gives rise to a rational, legitimate and nonarbitrary basis for rescinding a certification and requiring recertification. In recognition of this potential for psychological deterioration, a number of other states' statutory schemes specifically require that a psychiatric or psychological examination of specified parole applicants be conducted within a specified period of time prior to consideration of the parole application.<sup>32</sup> Although the Nevada statutes at issue do not set forth a time limitation when a

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<sup>32</sup> See, e.g., R.I. Gen. Laws § 13-8-23(e) (1993), which provides in pertinent part that:

[N]o applicant for parole who is incarcerated for a crime of violence as defined in section 11-47-2 shall be considered for parole unless a psychological examination of said applicant that includes standardized national psychological testing was completed within one (1) year prior to the applicant's parole hearing date or any continuance thereof . . . .

certification shall no longer be deemed valid, the statutes also do not specify that a certification shall be deemed valid in perpetuity. Consequently, because the Parole Board's request for recertification of an offender whose previous certification was not rendered within one year would be based upon a rational, legitimate and non-arbitrary basis, imposition of such a requirement does not violate the language of the statutes and comports fully with the offender's right to not to have his or her existing certification status arbitrarily changed.

### CONCLUSION

Recertification by the sexual offense psychiatric panel may lawfully be required of an offender who has committed misconduct following a previous certification, when new information about the offender's mental or personal history becomes available, or when the previous certification was not rendered within one year of the current parole application hearing. The existence of such circumstances provides a rational, legitimate and nonarbitrary basis for questioning the propriety of a previous certification, and imposition of a recertification requirement under such circumstances is therefore neither inconsistent with the language of the statutes, nor inconsistent with the requirements of federal due process.

FRANKIE SUE DEL PAPA  
Attorney General

By: THOMAS M. PATTON  
Deputy Attorney General

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OPINION NO. 94-14 MINISTERS: County clerks can accept various types of evidence that a denomination, governing body or church is organized or established in Nevada before the county clerk issues a certificate of permission to perform marriages to a minister.

Carson City, September 29, 1994

The Honorable Virgil A. Bucchianeri, Storey County District Attorney, Post Office Box  
496, Virginia City, Nevada 89440

Dear Mr. Bucchianeri:

You have requested an opinion from this office regarding the county clerk's approval of a minister's application for a certificate of permission to perform marriages.

### QUESTION

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*See also* Or. Rev. Stat. § 144.228(2)(a) (1993), which provides that:

For the parole consideration hearing, the board shall cause to be brought before it and consider all information regarding such person. The information shall include:

(a) The written report of the examining psychiatrist or psychologist which shall contain all the facts necessary to assist the State Board of Parole and Post-Prison Supervision in making its determination. The report of the examining psychiatrist or psychologist shall be made within two months of the date of its consideration . . . .

What is required for a "denomination, governing body and church, or any of them" to be organized or established in the State of Nevada pursuant to [NRS 122.062\(1\)](#)?

### ANALYSIS

[NRS 122.062\(1\)](#) states in pertinent part that:

Any licensed or ordained minister in good standing within his denomination, whose denomination, governing body and church, or any or them, are incorporated or organized or established in the State of Nevada, may join together as husband and wife persons who present a marriage license obtained from any county clerk of the state, if such minister first obtains a certificate of permission to perform marriages as proved in this section and [NRS 122.064](#) to [122.073](#), inclusive.

[NRS 122.064](#)—.073, inclusive, set forth the procedure for a minister to obtain a certificate of permission to perform marriages (certificate). The application is made in writing to the county clerk of the county in which the minister resides. It must show the date of licensure or ordination, or both, of the minister and the name of the denomination, governing body and church, or any of them, with which he is affiliated and must be accompanied by two copies of the denominational standing of the applicant. In addition the county clerk may require other information from the minister's congregation, an investigation of the background and present activities of the minister by the district attorney and sheriff, or other information. The county clerk must be satisfied that the applicant's ministry is primarily one of service to his congregation or denomination, and that his performance of marriages will be incidental to such service, or, in the case of a retired minister, that his active ministry was of such nature; that the applicant has not had a previously issued certificate canceled; and that the applicant has not been a felon within ten years of the date of application.

The county clerk has broad discretion concerning the issuance of this certificate and must make several factual determinations before issuing it. The Nevada Supreme Court has ruled on this statute in *Paramore v. Brown*, [84 Nev. 725](#), 448 P.2d 699 (1968), and although that case dealt with the statutory requirement that an applicant's ministry be primarily one of service to his congregation, the court's language provides guidance in answering the question presented here.

In *Paramore* the court discussed the guidance the statute provides to county clerks in making a determination of whether the applicant's ministry was primarily one of service to his congregation and acknowledged the broad discretion the county clerk has in issuing this certificate. The court found that the statute was not vague and provided adequate guidance to the county clerk. *Paramore*, 84 Nev. at 727-28. The court remanded that case for the county clerk to make the necessary factual determinations before the county clerk used his discretion in deciding to issue the certificate or not. *Id.* at 728. The court also confirmed that these discretionary rulings by the court clerk are subject to court review for abuse pursuant to [NRS 122.071](#). *Id.* at 727.

Before a minister may perform a marriage ceremony, the statutory provision that is the subject of the present opinion request, [NRS 122.062\(1\)](#) (the applicant's denomination must be incorporated or organized or established in the State of Nevada), must be satisfied and the minister must have a certificate from the county clerk. [NRS 122.062\(1\)](#) does not specify who makes this finding, but since this finding must be satisfied in addition to the county clerk issuing a certificate, it seems reasonable that the county clerk satisfy himself that the applicant's denomination, governing body or church is incorporated, organized or established in Nevada before issuing a certificate.

The Secretary of State's office has the information as to whether a denomination, governing body or church is incorporated in Nevada. If the Secretary of State certifies that the denomination, governing body or church is not incorporated in Nevada, it must then be determined if the

denomination, governing body or church is organized or established in another way in Nevada. If this inquiry reveals that the denomination, governing body or church is not organized or established in Nevada and the Secretary of State certifies that the denomination, governing body or church is not incorporated in Nevada, then the county clerk can refuse to issue a certificate on this ground.

In making this decision, the county clerk could consider various types of evidence which the applicant might present, such as, affidavits from members of the denomination, governing body or church; a rental agreement for a meeting place; a newspaper or flyer advertising services; or any other pertinent evidence.

### CONCLUSION

The county clerk must be satisfied that a denomination, governing body, or church is organized or established in Nevada before the county clerk issues a certificate of permission to perform marriages to a minister licensed or ordained and in good standing within that denomination, governing body or church. Evidence confirming organization or establishment in Nevada could be incorporation documents certified by the Secretary of State; affidavits of from members; a rental agreement for a meeting place; a newspaper or flyer advertising services; or any other pertinent document of this type.

FRANKIE SUE DEL PAPA  
Attorney General

By: KATERI CAVIN  
Deputy Attorney General

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OPINION NO. 94-15 INTERNSHIP; LABOR; SIIS; UNIVERSITY OF NEVADA: Student interns of the University of Nevada are not employees of the business or organization for whom the intern provides services for purposes of the minimum wage provisions of chapter 608 of NRS where it is the University which contracts with the organization and not the intern, the intern applies to the University for the internship and it is the University which selects specific students to be interns for specific organizations. An intern who receives a stipend directly from a private, for-profit business may be considered an employee of that business for purposes of coverage under the State Industrial Insurance System.

Carson City, June 8, 1994

Mr. Donald Klasic, General Counsel, University and Community College, System of Nevada, Office of the Chancellor, 2601 Enterprise Road, Reno, Nevada 89512

Dear Mr. Klasic:

You have asked questions concerning the status of University of Nevada students who participate in various types of internships. Your primary interest is whether certain attributes of these internships may create an employment relationship between the student intern and the public or private organization which offers the student the opportunity to gain work experience, which relationship would in turn create liability for the organization under state minimum wage laws or the State Industrial Insurance System statutes.

### BACKGROUND

The University of Nevada, Reno, seeks out public and private businesses and organizations (organizations) for placement of student interns. The organizations may be either profit or nonprofit entities. The University enters into agreements with these organizations whereby the University provides the organization with students who are suitable to the needs of the organization. In turn the organization agrees to provide work experience relevant to the needs of the student. A student who seeks an internship applies through the University and typically gains academic credit at the completion of the internship. In some cases the organization may pay the intern's tuition directly to the University. In other cases the organization may pay a stipend directly to the student.

### QUESTION ONE

Does the above-described internship procedure create an employment relationship between the student intern and the organization which would require the organization to pay the intern a minimum wage under the provisions of chapter 608 of NRS?

### ANALYSIS

[NRS 608.250](#) provides in relevant part that employees in private employment must be paid a specified minimum wage. The term "wage" is defined in relevant part as "[t]he amount which an employer agrees to pay an employee for the time the employee has worked, computed in proportion to time." [NRS 608.012](#). Read together, these two statutory provisions limit the application of the minimum wage requirement to an *employer* in a *private* business who pays *wages* to an employee. Based on these requirements it is clear that an internship with a public organization would not under any circumstances come within the minimum wage mandates of chapter 608 of NRS. *See also*, Op. Nev. Att'y Gen. No. 81-9 (Sep. 24, 1981) (chapter 608 of NRS is intended to control private employment only). Therefore, the remainder of our discussion concerning the minimum wage provisions of chapter 608 of NRS is limited to situations involving private employers.

The determinative question is whether there is a sufficient relationship between the intern and the organization to establish the organization as an "employer" and the intern as an "employee" for purposes of the minimum wage requirements of [NRS 608.250](#). The premier case on this point is *Prieur v. D.C.I. Plasma Center*, [102 Nev. 472](#), 726 P.2d 1372 (1986). In that case the Nevada Supreme Court applied the "economic reality test" to determine whether an employment relationship existed between inmates of the Nevada state prison system and a private corporation which provided work for inmates on its premises. In concluding that no employment relationship existed the court noted the following relevant facts:

1. The Department of Prisons (DOP) was the entity which entered into contracts with the organization.

2. The inmates were required to apply to DOP for the off-grounds work.

3. It was DOP which selected inmates for work assignments.

*Id.*, at 474. The *Prieur* facts parallel the facts in the instant case substantially and we therefore must conclude that a court would interpret the intern-organization relationship described above as not being one of employee and employer subject to the provisions of [NRS 608.250](#). A similar analysis was used in *Prieur* with regard to the Fair Labor Standards Act's minimum wage requirements. 29 U.S.C.S. § 206(a)(1) (Law. Co-op. 1975 & Supp. 1991); *Prieur* at 473.

### CONCLUSION TO QUESTION ONE

The relationship between a University of Nevada, Reno, student intern and the business or organization for whom the intern performs services does not constitute an employee-employer relationship for purposes of the minimum wage provisions of chapter 608 of NRS, where it is the University which contracts with the organization and not the intern, the intern applies to the University for the internship and it is the University which selects specific students to be interns for specific organizations.

## QUESTION TWO

Must a student, who is performing an internship with a private, for-profit business and who receives a stipend from that business for participating in the internship, be covered by the business as an employee for purposes of coverage under the State Industrial Insurance System (SIIS)?

## ANALYSIS

[NRS 616.068](#) provides:

Persons *other than students* who, under a written agreement between a public agency and a private organization, perform *volunteer* work for a private organization as part of public program and who are not specifically covered by any other provisions of this chapter, while engaging in that volunteer work, *may be* deemed by the system, or by a self-insured employer, for purposes of this chapter, as employees of the public agency at a wage of \$100 per month and are entitled to the benefits of this chapter *when the public agency complies with the provisions of this chapter* and the regulations adopted under it. [Emphasis added.]

The statute provides that students generally may not be treated as volunteers when they intern with a private, for-profit organization even when they do not receive any kind of remuneration from the organization. Your concern is essentially whether payment of the student's tuition by the organization would constitute a "wage" which would indicate an employee-employer relationship between the intern and the organization which would in turn require the organization to cover the intern as an employee pursuant to the general requirements of chapter 616 of NRS. See [NRS 616.055](#). You have provided us with a letter dated February 14, 1994, from Scott Young, General Counsel to SIIS, wherein Mr. Young addresses this issue. Mr. Young advises that SIIS would not consider a direct payment of the intern's tuition from the organization to the University a wage. Since the intern would receive no remuneration directly from the organization under this situation, we would concur in Mr. Young's conclusion.

A more troublesome situation is posed if the intern receives a stipend directly from the organization. In this case the methods of calculating and paying the stipend must be examined to ascertain whether an employment relationship exists. If the stipend is paid periodically to the intern and is based on an hourly rate for work performed, the stipend would likely be considered wages. See [NRS 616.027](#), defining "average monthly wage." If the stipend is paid to the student in lump sum at the conclusion of the internship and is based directly on the intern's tuition costs and not on an hourly payment for work performed, it is less likely that the stipend would be considered a wage by SIIS. It would be a further indication that the stipend is not a wage for SIIS purposes if the quotient of the lump sum stipend divided by the number of hours worked by the intern is less than the minimum wage, according to Mr. Young. We concur.

While we have provided some general guidelines as to indicia which might demonstrate the existence of an employee-employer relationship for SIIS purposes under certain circumstances it is not possible to anticipate in this opinion all variations of indicia which might affect a determination of "employment." It is possible, however, to tailor the intern-organization relationship to fit within the above referenced guidelines by use of narrowly drafted agreements between the student and the

University, and between the University and the organization. For instance, by providing that an organization may only pay an intern's tuition directly to the University in lump sum and only in an amount sufficient to cover tuition costs for a certain academic period, such as a semester or academic year, one indicia of employment might be eliminated and the likelihood of an administrative or judicial finding of employment for purposes of SIIS coverage thereby reduced. We therefore suggest that consideration be given to creating a uniform procedure, set out in standard written agreements, which falls within the parameters mentioned above.

### CONCLUSION TO QUESTION TWO

A student who is performing an internship with a private, for-profit business and who receives a stipend from that business for participating in that internship may be considered an employee of that business for purposes of coverage under the State Industrial Insurance System. Such a determination is based on several factors and must be made on a case-by-case basis. Certainty as to the status of interns for purposes of coverage under the State Industrial Insurance System may be increased through use of standardized written agreements which limit the method and amount of tuition payment and which provide for direct payment from the participating business directly to the University.

FRANKIE SUE DEL PAPA  
Attorney General

By: KATERI CAVIN  
Deputy Attorney General

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OPINION NO. 94-16 PUBLIC RECORDS: University chancellor applicants; names and other information are public records.

Carson City, January 4, 1994

Mr. Don Klasic, General Counsel, University and Community College System of Nevada,  
2601 Enterprise Road, Reno, Nevada 89512

Dear Mr. Klasic:

The Board of Regents of the University and Community College System of Nevada has commenced a nationwide search for the next chancellor of the University and Community College System. You have sought guidance from this office regarding a request for disclosure of the names and other information regarding the applicants.

### QUESTION

Are the names and other information regarding applicants for the position of chancellor public records?

### ANALYSIS

You have concluded that the names and other information regarding the candidates should not be disclosed until the first cut is made. The basis for your conclusion is the case of *Arizona Board of Regents v. Phoenix Newspapers, Inc.*, 806 P.2d 348 (Ariz. 1991), where the Arizona Supreme Court held that the names and resumes of persons in the "pool of prospects" for a state university presidency did not have to be disclosed. The Arizona court held, however, that the names and

resumes of those persons who were in the smaller pool of final candidates must be disclosed. You have asked for our opinion under Nevada's public records law.

Where the legislature has not defined what a public record is and, as in this case, there is no statutory guidance addressing applications for the position of chancellor or other high public office, you must balance the public interest in disclosure with the public interest, if any, served by non-disclosure. *See generally* [NRS 239.010](#). You must bear in mind that deference to disclosure in the public interest shall be given great weight. This balancing of competing public interests was formally articulated by this office in Op. Nev. Att'y Gen. No. 86-7 (May 12, 1986) and affirmed by the Nevada Supreme Court in *Donrey of Nevada, Inc. v. Bradshaw*, [106 Nev. 630](#), 798 P.2d 144 (1990).

To determine the competing public interests and the weight they may have, you must look closely to the facts of the particular matter. To guide you, the case of *Arizona Board of Regents v. Phoenix Newspapers, Inc.* is instructive. In that case a search committee was formed to fill the position of president at Arizona State University. An executive search firm was hired to assist. The committee and the search firm considered approximately 250 persons. Of those, 59 persons actually applied, the others were suggested by other persons and many were unaware they were being considered, nor had they consented to being considered. None of the 59 persons who actually applied made the final 17.

The Arizona Supreme Court, in deciding that the public interest in assuring the state's ability to secure the most qualified candidates for the university president's position is more compelling than the public's interest in, or need to know, the names of the prospects who were *not* considered after the first cut, found specific facts supporting a conclusion that confidentiality was critical in attracting and recruiting the most highly qualified prospects for the Arizona State University presidency. The court noted that the board was advised by the search firm that publishing the names of prospects in a university search reduces the number of applicants by one-fourth, in effect skimming the cream off the pool of applicants. In a previous Arizona State University presidential search, two of six finalists withdrew their names from consideration after their names were leaked to the press and published. The court weighed the specific facts favoring non-disclosure with a finding of little public interest in the names of persons who were merely prospects until the first cut and then no longer under any consideration.

The court distinguished between the initial group of approximately 250 persons as only prospects and those among them who would be candidates. The court defined as candidates those persons seriously being considered, and interviewed, for the position. A prospect may not know that he or she is being considered, may not wish to be, and may find it embarrassing and harmful to his or her career. *Id.* at 352.

It is clear that the decision of *Arizona Board of Regents* rests firmly on those indicators supporting the search committee's conclusion that confidentiality in the initial search was critical to attracting and recruiting highly qualified prospects from other universities, and on minimal public interest in disclosure of the names of those persons who were never candidates. *See also, Cox Arizona Publications, Inc. v. Collins*, 852 P.2d 1194, 1198 (Ariz. 1993) (distinguishing *Arizona Board of Regents* and finding no indicators of a public interest in favor of withholding of police investigation file of an on-going prosecution); *City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316, 1324 (Alaska 1982) (finding a claim that disclosure would narrow the field of applicants and ultimately prejudice the interests of good government not sufficiently compelling to overcome public interest in disclosure). Such compelling factors are not present in the ongoing search for a new chancellor.

In *City of Kenai*, the public positions to be filled were for chief of police and city manager. In finding that disclosure of the applications was required, the court noted that there was not a large

number of applicants desiring to withdraw their names in the face of disclosure and stated "[i]t is not intuitively obvious that most well qualified applicants for positions of authority in municipal governments will be deterred from applying by a public selection process . . . ." *Id.* The *Kenai* decision underscores the necessity for a factual and not merely speculative basis to support non-disclosure in the public interest.

While the Alaska Supreme Court found insufficient facts to support a need to keep applicant names confidential to assure obtaining the best qualified applicants, the court found it proper to allow applicants to withdraw to avoid disclosure, because some believed their applications would be confidential and the court found little public interest in the names of withdrawn candidates. This is consistent with the letter opinion of this Office, issued April 30, 1986, wherein it was concluded that Nevada's public record law required the disclosure of the names and applications of all candidates for city manager of Carson City. *See* Letter of Scott W. Doyle to Noel S. Waters, April 30, 1986. We also concluded that candidates who had submitted their applications with the understanding that their names would not be disclosed should be given the opportunity to withdraw their applications.

### CONCLUSION

After applying the balancing test to the facts before us, we conclude that the public interest outweighs any need for confidentiality in the process of selecting a university system chancellor. In addition, each candidate may be informed of the public records disclosure requirement and may expressly request that his or her name or application be withdrawn from consideration.

FRANKIE SUE DEL PAPA  
Attorney General

By: BROOKE A. NIELSEN  
Assistant Attorney General

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OPINION NO. 94-17 CAMPAIGN CONTRIBUTIONS: A business entity may give the maximum campaign contribution allowed by statute irrespective of its relationship to other business organizations.

Carson City, January 18, 1994

The Honorable Darrel Daines, State Controller, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Daines:

You have requested an opinion from this office regarding campaign contributions.

### QUESTION

Does [NRS 294A.110](#) limit the contribution by a business organization which operates through two or more corporations to the maximum specified in the statute, or does the limitation apply only to the maximum amount each individual corporation can contribute irrespective of its relationship to other corporations?

### ANALYSIS

Campaign contributions are limited in Nevada pursuant to [NRS 294A.110](#) which states:

1. A person, other than a natural person, political party or committee sponsored by a political party, shall not make a contribution or contributions to a candidate for:
  - (a) A city, county, state or judicial office in a total amount which exceeds \$10,000; or
  - (b) A statewide office in a total amount which exceeds \$20,000,during the period beginning on the day after the last general election for that office and ending on the day of the general election for that office.
2. A candidate shall not accept a contribution made in violation of subsection 1.
3. A person who violated any provision of this section is guilty of a misdemeanor.

[NRS 294A.009](#) defines "person" as being "limited to a natural person, any labor union, any business or voluntary association, any committee for political action or sponsored by a political party and any corporation."

Reading these two statutes together, the campaign limitations found in [NRS 294A.110](#) apply to any labor union, any business or voluntary association, any committee for political action, and any corporation.

Your concern is how the campaign contribution restrictions apply to corporations which may have a relationship to one another such as common ownership, parents and subsidiaries, and holding companies. The statute does not address this issue, and in Nevada corporate ownership is not a matter of public record, nor is any interrelationship between business associations. Nevada corporations only have to file an annual list of officers and directors pursuant to [NRS 78.150](#). Corporations that are qualified to do business in Nevada have the same requirement. [NRS 80.110](#). Nevada law does not require the names of stockholders of any corporation to be on file in the Secretary of State's office at any time.

Courts recognize that corporations solely owned or controlled by one or a few individuals or by other corporations do not, by virtue of such stock ownership alone, lose their identities as distinct legal entities. Just as a holding or parent corporation has a separate corporate existence and is to be treated as a separate entity, so, too, are subsidiary corporations ordinarily independent of each other. *Miller v. Robertson*, 266 U.S. 243, 254-55 (1924); *C M Corp. v. Oberer Development Co.*, 631 F.2d 536, 538-39 (1980).

The campaign contribution statute is not limited to Nevada corporations or to those corporations that are qualified to do business in Nevada. It applies to any corporation formed anywhere; however, the ownership and the interrelationship between any of these corporations is not required to be disclosed.

Every candidate must report campaign contributions, but only the name and address of each contributor of over \$500 is listed. [NRS 294A.120\(6\)](#).

### CONCLUSION

[NRS 294A.110](#) limits the campaign contribution a labor union, business or voluntary association, committee for political action, and any corporation, subsidiary corporation, partnership, joint venture etc. can give to a candidate. Each business entity may give the maximum amount allowed in [NRS 294A.110](#) irrespective of its relationship to other business organizations.

FRANKIE SUE DEL PAPA  
Attorney General

By: KATERI CAVIN  
Deputy Attorney General

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OPINION NO. 94-18 CANDIDATES: A 17-year-old who will be 18 before the next election can file for office and specifically for school board.

Carson City, March 9, 1994

Mr. S. Mahlon Edwards, County Counsel, Clark County District Attorney's Office, Post Office Box 552215, Las Vegas, Nevada 89155-2215

Dear Mr. Edwards:

You have requested an opinion from this office regarding filing of declaration of candidacy by a 17-year-old and his running for the office of trustee of a school district.

Your questions are based upon the following set of facts. A 17-year-old in Clark County, who will be 18 on August 30, 1994, attempted to file for the office of trustee of the Clark County School District. His declaration of candidacy was not accepted by the Clark County Registrar of Voters for the reason that he is currently 17 years old.

#### QUESTION ONE

May an individual who has not yet attained the age of 18 years declare his candidacy for the office of trustee of a school district?

#### ANALYSIS

For an individual to declare his candidacy for the office of trustee of a school district, the individual must file with the filing officer a declaration of candidacy pursuant to [NRS 293.177](#). Until such filing has been completed, the individual is not a candidate. [NRS 294A.005\(1\)](#) defines a candidate as "any person who files a declaration of candidacy." So up to the time when a declaration of candidacy has been filed, an individual is not a candidate.

It is important to distinguish between being eligible to file for an elected position, being eligible to run for that position, and being eligible to hold that position if elected. The criteria may be different for each of these stages and the authority to determine eligibility may reside with different public officials.

It has been the rule in Nevada since 1920 that a ministerial filing officer does not have the authority to determine the validity of a filing beyond compliance on the face of the form, facial validity. The Nevada Supreme Court stated in *State v. Glass*, [44 Nev. 235](#), 241, 192 P. 263 (1920) that:

Ministerial officers are by the law required to receive and file such instruments as are duly executed, provided such instruments purport upon their face to be of the nature of instruments entitled to be filed or recorded, as the case may be. Such officer has the right to exercise discretion as to matters of form, but not to exercise judicial discretion.

See also *State ex rel. Security Savings and Loan Association v. Brodigan*, [44 Nev. 212](#), 215, 192 P. 263 (1920), where the court opined:

The duties of secretary of state, with respect to filing certificates of incorporation and papers relative to corporations, are ministerial . . . . The discretion to be exercised by the

secretary of state does not extend to the merits of an application for incorporation, although it may be exercised as to matters of form.

Filing officers are ministerial officers and have a duty to examine instruments presented for filing for facial validity. For example, if an individual presented a declaration of candidacy to a filing officer and the individual stated that he or she did not meet the legal requirements for the office, the filing officer would have a duty to refuse to accept the filing. However, if, in the declaration of candidacy, the individual states that he or she will meet the legal requirements for the office (and other requirements, such as payment of the filing fee, have been met), then the filing officer must accept and file the declaration.

In Nevada a 17-year-old is legally permitted to register to vote if he or she will be 18 on or before the next election and he or she is otherwise eligible. [NRS 293.485](#). The fact that an individual is not 18 at the time of filing in and of itself is insufficient to reject a declaration of candidacy. In fact that part of the declaration of candidacy which deals with qualifying is worded in the future tense and states in pertinent part "I *will* qualify for the office if elected thereto." [NRS 293.177\(2\)](#) (emphasis added).

Acceptance and filing a declaration of candidacy does not automatically mean that the candidate is eligible to run for or hold that office. Nevada law provides for a means to challenge a candidate once he or she has filed a declaration of candidacy, although that procedure is not specifically stated in the election laws. The district attorney can petition the court for a writ of mandamus to compel the filing officer to remove a candidate's name from the ballot. A private citizen can do the same. See *Nevada ex rel. Piper v. Gracey*, [11 Nev. 223](#), 230 (1876).

### CONCLUSION TO QUESTION ONE

A filing officer must accept and file a declaration of candidacy submitted by a 17-year-old who will be 18 on or before the next election if the declaration of candidacy is valid as to form and other statutory requirements, such as payment of filing fees, have been met.

### QUESTION TWO

Does Nevada law permit a 17-year-old, who will be 18 before the general election, to be a candidate for the office of trustee of a school district?

### ANALYSIS

This question involves proper construction of the applicable provision of the Nevada Constitution, Nevada election law, and the statutory provision defining the qualifications and eligibility of candidates for the office of trustee of a school district.

The Nevada Legislature has declared that Nevada election laws "shall be liberally construed to the end that all electors shall have an opportunity to participate in elections and that the real will of the electors may not be defeated . . ." [NRS 293.127](#). [NRS 293.485\(2\)](#) permits an eligible person whose 18th birthday occurs on or before the next election to register to vote. Article 2, section 1 of the Nevada Constitution sets forth the qualifications to be an elector and one of the qualifications is that a person be 18 years of age.<sup>33</sup> [NRS 386.240\(1\)](#) states that one of the qualifications to be a candidate for school board trustee is that one is a qualified elector. Article 15, section 3 of the Nevada Constitution states that "[n]o person shall be eligible to any office who is not a qualified elector under this constitution."

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<sup>33</sup> Qualified elector is defined for purposes of voting, not for running for office, and voting occurs at the election.

The Nevada Constitution in article 15, section 3 fixes the time of eligibility for public office as at the time of the general election with the phrase "eligible to any office."

The Supreme Court of Oklahoma in *Findley* concluded that similar wording in the Oklahoma Constitution meant that a candidate must meet the qualifications when elected at the general election. *Findley v. State Election Board of Oklahoma*, 325 P.2d 1037 (Okla. 1958). Article VI, section 3 of the Oklahoma Constitution stated in pertinent part "[n]o person shall be eligible to the office of . . . Attorney General . . ." and then listed the qualifications. The court concluded that:

[T]he eligible qualifications provided therein mean that a candidate must meet these qualifications when elected at the General Election, and not at a primary election whereby a candidate may only be nominated as a candidate for election at the General Election.

*Id.* at 1040.

The Supreme Court of Arizona, when faced with the issue of when to determine the qualification of a candidate, prior to the primary election or after the candidate has been declared nominated at the primary election, held that challenging the qualification of a candidate prior to the primary election was premature. *Nicol v. Superior Court*, 106 Ariz. 208, 473 P.2d 455, 459 (1970). Although not deciding the issue, the court indicated that only if the potential candidate cannot, in any way, qualify by the time of the general election should the name be excluded from the primary ballot.

To read the above referenced constitutional and statutory provisions to mean that a candidate for school district trustee must be a qualified elector (18 years of age) to run for the office, excludes 17-year-olds who will be qualified electors at the time of the general election. These 17-year-olds would be qualified electors when elected to office and therefore meet the constitutional requirement in article 15, section 3, but would be prohibited from running for the office for the reason that they were not 18 at the time of filing. This reading of these provisions results in an absurd and unreasonable result which the court in Nevada disfavors. See *Las Vegas Sun v. District Court*, [104 Nev. 508](#), 511, 761 P.2d 849 (1988) and *McCrackin v. Elko County School Dist.*, [103 Nev. 655](#), 658, 747 P.2d 1373 (1987).

Age can be distinguished from other qualifications since aging happens automatically while other qualifying requirements, such as residence or licensure, do not. With the passage of time one will meet the age requirement. With other requirements intervening acts may prevent one from qualifying.

The term "qualified elector" found in [NRS 386.240](#) and defined in article 2, section 1 of the Nevada Constitution must include 17-year-olds who meet the qualification to register to vote in [NRS 293.485\(2\)](#). Any other reading of these provisions could result in a person who would be qualified to hold office at the time of the general election not being allowed to run for that office.

#### CONCLUSION TO QUESTION TWO

Nevada law permits a 17-year-old who will be 18 before the general election to be a candidate for the office of trustee of a school district.

FRANKIE SUE DEL PAPA  
Attorney General

By: KATERI CAVIN  
Deputy Attorney General

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OPINION NO. 94-19 INDIANS; JURISDICTION; CRIMINAL LAW; ARREST: Tribal authorities are authorized by state statute to arrest non-Indians who violate state law in Indian country. There is no requirement for an agreement between the affected tribe and any other political entity before such authority may be exercised.

Carson City, June 6, 1994

Mr. Gerald Allen, Acting Executive Director, Nevada Indian Commission, 4600 Kietzke Lane, Building B-116, Reno, Nevada 89502

Dear Mr. Allen:

You have asked this office for an opinion about the authority of tribal police over non-Indians in Indian country. Your specific inquiry is as follows:

#### QUESTION

Does tribal exercise of statutory arrest authority over non-Indians in Indian country, as provided at [NRS 177.1255](#), depend upon an agreement with the affected county as a prerequisite for its exercise?

#### ANALYSIS

The legislature has granted a limited arrest authority to tribal law enforcement personnel. The authority is established in subsection (1) of [NRS 171.1255](#). Subsection (2) geographically limits its exercise.<sup>34</sup>

The circumstances giving rise to the creation of this authority are described in the legislative history for the bill which became law in 1985. Its primary purpose is to address non-Indians whose misconduct had gone unaddressed under previous law.

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<sup>34</sup> NRS 171.1255 reads in full:

1. Except as otherwise provided in subsection 2, an officer or agent of the Bureau of Indian Affairs or a person employed as a police officer by an Indian tribe may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:
  - (a) For a public offense committed or attempted in his presence.
  - (b) When a person arrested has committed a felony or gross misdemeanor, although not in his presence.
  - (c) When a felony or gross misdemeanor has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.
  - (d) On a charge made, upon a reasonable cause, of the commission of a felony or gross misdemeanor by the person arrested.
  - (e) When a warrant has in fact been issued in this state for the arrest of a named or described person for a public offense, and he has reasonable cause to believe that the person arrested is the person so named or described.
  - (f) When the peace officer has probable cause to believe that the person to be arrested has committed a battery upon that person's spouse and the peace officer finds evidence of bodily harm to the spouse.
2. Such an officer or agent may make an arrest pursuant to subsection 1 only:
  - (a) Within the boundaries of an Indian reservation or Indian colony for an offense committed on that reservation or colony; or
  - (b) Outside the boundaries of the Indian reservation or Indian colony if he is in fresh pursuit of a person who is reasonably believed by him to have committed a felony within the boundaries of the reservation or colony or has committed, or attempted to commit, any criminal offense within those boundaries in the presence of the officer or agent.

For the purposes of this subsection, "fresh pursuit" has the meaning ascribed to it in NRS 171.156.

On the reservations, there are cases where non-Indians on the reservation commit crimes. A sheriff from another county can arrest non-Indians on a reservation; but in some cases, because of political considerations, a sheriff is hesitant to go on to the reservation to make an arrest. It causes the appearance of a dual standard, where non-Indians may appear to go on a reservation, commit crimes, and are not subject to arrest.

The Bureau of Indian Affairs and some of the tribal police have indicated that a bill such as AB 76 would be beneficial to them. It would permit them to arrest non-Indians for offenses under state law on the reservations, but it would not permit them to make any arrests of any non-Indians outside their reservation. The jurisdiction would be strictly on the reservations.

Minutes of February 11, 1985, hearing on A.B. 76 before the Assembly Committee on Judiciary at 222.

The difficulty in dealing with non-Indians in Indian country arises from the confusing interplay of competing criminal jurisdictions in Indian country. "Criminal jurisdiction rules for crimes committed on Indian reservations form a confusing maze of federal, state, and tribal court authority." Note, "*Criminal Jurisdiction of Tribal Courts Over Nonmember Indians: The Circuit Split*," 1989 Duke L. J. 1053, 1055. The respective federal, state and tribal jurisdictions have been set out in tabular form. See William C. Canby, Jr., *American Indian Law in a Nutshell* 128 (1981). Categories are based upon the status of the offender, the status of the victim if there is one, and the nature of the crime. However, some tentativeness attends any categorical statement about jurisdiction. See generally F. Cohen, *Felix S. Cohen's Handbook of Federal Indian Law*, 281-384 (1982 ed.).

As a general matter, a reservation is a part of the state in which it is located, and the state's criminal law is effective against non-Indians who there commit either victimless crimes or crimes against other non-Indians. *Jones v. State*, [92 Nev. 116](#), 546 P.2d 235 (1976). See also Op. Nev. Att'y Gen. No. 91-3 (April 1991).

Although this limited state criminal jurisdiction on reservations is well-established, its efficient exercise is problematic. The counties are reluctant to engage in on-reservation activities because of the jurisdictional complexities and political factors. The remote locations of some reservations also limit county involvement.

Tribal authorities, in the absence of conferral of express powers by the state, generally have no criminal jurisdiction over non-Indians. "[T]he tribes surrendered the authority to try and punish non-Indian offenders against tribal law when they submitted to the sovereignty of the United States." *Cohen* at 336. Federal law enforcement authorities suffer a similar deficiency of jurisdiction for crimes committed by non-Indians which do not involve an Indian victim. *Id.* at 298-300.

The result is a void in law enforcement on reservations which results in unpunished lawless behavior, to the detriment of order in the reservation communities. It was this void which [NRS 171.1255](#) was intended to fill. The statute unconditionally states that the tribal or Bureau of Indian Affairs authorities may arrest certain persons without regard to their status as Indians.

The legislature's solution is a practical one. It allows the tribal authorities who are regularly present on the reservations to arrest non-Indian violators. The disposition of the arrestee thereafter will depend on the nature of the offense with which he or she is charged. Some will be transferred to county custody, others to federal authorities.

The smooth transfer of the arrestee to the proper authorities may depend in practice on there being an understanding among the relevant entities. This office has previously advised use of agreements where possible. Op. Nev. Att'y Gen. No. 91-3 (April 1991). However, there is no express statutory requirement for entering into any agreement; nor is there, by any permissible implication arising from the statutory language, such a requirement. Courts "cannot attribute to the legislature an intent which is not in any way expressed in the statute." 82 C.J.S. Statutes § 322 (1953). Cf. *State v. Loveless*, [62 Nev. 17](#), 23, 136 P.2d 236 (1943) (courts will not "speculate beyond the reasonable import of the words of a statute").

### CONCLUSION

Tribal authorities are authorized by [NRS 171.1255](#) to arrest certain non-Indians who violate state law in Indian country. There is no requirement for an agreement between the affected tribe and any other political entity before such authority may be exercised.

FRANKIE SUE DEL PAPA  
Attorney General

By: C. WAYNE HOWLE  
Senior Deputy Attorney General

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OPINION NO. 94-20 NEVADA ATTORNEY FOR INJURED WORKERS; BIDS; WITNESSES: Nevada Attorney for Injured Workers (NAIW) is not required to solicit bids to purchase services of expert witnesses provided NAIW demonstrates that selection by bidding is not possible or appropriate.

Carson City, July 6, 1994

Ms. Nancyann Leeder, Nevada Attorney For Injured Workers, 1000 East Williams Street, Suite 213, Carson City, Nevada 89710

Dear Ms. Leeder:

As the Nevada Attorney for Injured Workers (NAIW), a state agency with a staff of attorneys and clerical assistants, you represent injured workers who request your representation beginning at the administrative appeal level. Your mission is to prepare and present workers' compensation cases at the Appeals Office, District Court and Supreme Court levels. In that capacity, expert witnesses are hired to assist with review of records, evaluation of the case, preparation of opinions, testimony at depositions or hearings. The experts may be medical, chemical, toxicological, accident reconstruction and many others as the case may require.

Because of questions raised by the Director of the Department of Administration, you have asked this office for an opinion on the following question:

### QUESTION

Is the NAIW required to comply with the provisions of [NRS chapter 333](#) (soliciting bids where appropriate) and NAC chapter 0300 (specifically, 0322) in connection with the purchase of services of expert witnesses?

## ANALYSIS

We must look to two sources to address your question. One is the State Administrative Manual (SAM) and the other is chapter 333 of NRS. Section 0338 of SAM directs that "an agency *shall whenever possible* solicit and review at least 3 bids or proposals for each contractor." [Emphasis added.] While it is the decision of the agency whether it's possible or appropriate to solicit bids, SAM requires the agency to justify why bids were not solicited. See § 344 II(9)(b) of SAM. The contract summary form seeks that information. We would expect that there is often ample justification to not obtain expert witnesses by soliciting bids. Expert witnesses are not fungible. For example, a physician may be an expert regarding the wrist and hand and have no expertise regarding the back. There are other qualities of an expert that bear on his or her desirability as a witness that also may make selection by bid inappropriate and it falls to NAIW to provide sufficient justification to show that bidding is not possible or appropriate.

The SAM directives comport with chapter 333 of NRS, the purchasing act, as it applies to contracts for services. At the threshold, your analysis raised a question of whether the NAIW fits within the definition of using agency for the purpose of chapter 333. With some exceptions not pertinent to NAIW, a using agency is defined as one which derives its funding, in whole or part, from public moneys whether it is provided by the State of Nevada, the federal government or derived from private or other sources. [NRS 333.020](#)(5). While the source of funding for NAIW is from the Worker Compensation and Safety Fund, this fund is public money. The fund is derived from non-voluntary assessments made against self-insured employers and the State Industrial Insurance System and supports not only NAIW but the Division of Industrial Relations and the cost of the hearing officers. See [NRS 232.680](#). Thus, NAIW derives its funding from public money and is a "using agency" within the ambit of the purchasing act.

Though it is a using agency within the ambit of the purchasing act, NAIW is not required by the purchasing act to follow bidding procedures to obtain the services of an expert witness. We reach this conclusion by the following analysis. The chief of the purchasing division shall contract for the purchase of supplies, materials and equipment. [NRS 333.150](#). Such contracts may be by bids or requests for proposals. [NRS 333.162](#). However, in regard to services, [NRS 333.165](#) states that "the chief [of the purchasing division] may, *upon request* from a using agency, contract for *services* needed by that agency if he determines that to do so would benefit the public or cause some other beneficial effect. [Emphasis added.] Therefore it is a discretionary decision of the using agency whether it is appropriate to request that a contract for *services* be made through the competitive bid process.

## CONCLUSION

Pursuant to chapter 333 of NRS, NAIW is not required to solicit bids to purchase the services of an expert witness. NAIW may request that contracts for the services of expert witnesses be procured by bid but is not required to do so. Under provisions of the State Administrative Manual, NAIW must provide sufficient justification to demonstrate that selection of expert witnesses by bidding is not possible or appropriate.

FRANKIE SUE DEL PAPA  
Attorney General

By: MELANIE MEEHAN CROSSLEY  
Senior Deputy Attorney General

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OPINION NO. 94-21 OPEN MEETING LAW: Local ethics board may not meet in closed session to discuss past conduct of a public official due to lack of a statutory exception to open meeting requirements.

Carson City, July 29, 1994

Larry G. Bettis, Esquire, Deputy City Attorney, City of Las Vegas, 400 East Stewart Avenue, 9th Floor, City Hall, Las Vegas, Nevada 89101

Dear Mr. Bettis:

In your letter of June 22, 1994, you pose a question regarding the application of Nevada's Open Meeting Law ([NRS chapter 241](#)) to the activities of the city's Ethics Review Board as follows:

#### QUESTION

When a person has complained that the past conduct of an elected city councilperson violated the City of Las Vegas Code of Ethics, may the city's Ethics Review Board conduct closed meetings in order to investigate, hear and dispose of such matters?

#### ANALYSIS

The Ethics Review Board meets the definition of a "public body" set forth within [NRS 241.015](#) and accordingly is subject to the Open Meeting Law. That law requires all meetings of public bodies to be public meetings except as otherwise specifically provided by statute. See [NRS 241.020](#).

There is no specific statutory exception contained within [NRS 281.541](#), or elsewhere within [NRS chapter 281](#), which would allow a local ethics committee to meet in closed session in order to review past conduct of a public officer or employee in light of a local code of ethics. The Nevada Supreme Court has refused to create exceptions to the general rule of open meetings when the legislature has failed to specifically provide for such exceptions. See *McKay v. Board of Cty. Comm'r*, [103 Nev. 490](#), 746 P.2d 124 (1987).

Additionally, the statutory exception set forth in [NRS 241.030](#) allowing a public body to close a meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of a person would not be available to a local ethics board when discussing the past conduct of an elected city councilperson. [NRS 241.031](#) limits the closed meeting exception set forth in [NRS 241.030](#) by precluding any such closed meeting for a public body's consideration of the four topics described above when applied to an elected member of a public body.

#### CONCLUSION

Since there is no statute providing a specific exception permitting a local ethics board to conduct closed meetings in order to consider the application of a local ethics code to the past conduct of an elected city councilperson, such closed meetings would be impermissible under the Open Meeting Law.

FRANKIE SUE DEL PAPA  
Attorney General

By: ROBERT L. AUER  
Senior Deputy Attorney General

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OPINION NO. 94-22 LABOR; EMPLOYMENT AGENCIES: [NRS 611.220](#) does not limit the fees that a private employment agency may charge employers who use its services to obtain employee referrals.

Carson City, August 26, 1994

Mr. F. T. MacDonald, Nevada Labor Commissioner, 1445 Hot Springs Road, Carson City, Nevada 89710

Dear Mr. MacDonald:

You have asked whether, under [NRS 611.220](#), the limit on fees that might be charged by a private employment agency applies to fees that might be paid by an employer. Our simple answer is that the fee limit only applies to fees paid by employees, not by employers.

#### QUESTION

Does the limit on fees provided in [NRS 611.220](#) that might be charged by a private employment agency apply to fees that might be charged an employer where the employer has sought the placement?

#### ANALYSIS

[NRS 611.220](#) provides:

No employment agency licensed pursuant to the terms of [NRS 611.020](#) to [611.320](#), inclusive, may charge, accept or collect from *any applicant for employment* as a fee for securing the employment any sum of money in excess of 65 percent of the first month's gross cash wage received for the employment, except babysitting. The fee for a placement for babysitting must not exceed 15 percent of the gross cash wage received. [Emphasis supplied.]

[NRS 611.230](#) further requires that each Nevada licensed employment agency must post in its office a sign that reads: "No fee may be charged *an applicant for employment* which exceeds 65 percent of the first month's gross cash wage." [Emphasis supplied.] Employment agencies may furnish "information to a person seeking employees enabling or tending to enable him to obtain employees." [NRS 611.020](#)(2)(b).

While the more common business of employment agencies is to place a job applicant with an employer, in which case the agency receives its fee from the employee, it was also anticipated by the legislature that some employment agencies might be asked by an employer to find employees to fulfill the needs of the employer and that the employer might pay the agency for those services, rather than the employee. The fee limitation in [NRS 611.220](#), by its express terms, only applies to fees charged an employee. No similar limitation was put upon fees that may be charged an employer.

The legislature's decision to limit the fees charged to employees but not to limit the fees charged to employers is sensible. Applicants seeking work are vulnerable to exploitation because of their pressing need for employment. Limiting the fee that might be charged such applicants protects them from this exploitation and levels the unequal bargaining power to which the applicant would otherwise be subject. On the other hand, an employer can seek its own employees and will use the services of an employment agency for convenience. In such a case, the employer

and the employment agency are in equal bargaining positions and can truly negotiate at arms-length to reach a mutually agreeable fee structure.

### CONCLUSION

[NRS 611.220](#) does not limit the fees that can be charged by an employment agency where the fees are to be paid by the employer.

FRANKIE SUE DEL PAPA  
Attorney General

By: LOUIS LING  
Deputy Attorney General

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OPINION NO. 94-23 BANKING; FINANCIAL INSTITUTIONS; CHARTERS: A foreign depository institution which solicits money from Nevada residents in connection with the establishment of a credit card account, is soliciting deposits in this state within the meaning of [NRS 80.015](#)(3)(b) and 80.016, and therefore, is not exempt from the licensing law by [NRS 80.015](#). A depository institution as defined in [NRS 657.037](#) may not, in connection with its offer of a credit card account to a person in this state, solicit a deposit to secure the account without first having obtained a license to conduct a banking business as required by [NRS 659.115](#).

Carson City, November 28, 1994

Mr. Burns Baker, Deputy Commissioner, Financial Institutions Division, 406 East Second Street, Carson City, Nevada 89710

Dear Mr. Baker:

You have asked for our opinion on the following:

### QUESTION

May a depository institution as defined in [NRS 657.037](#), in connection with its offer of a credit card account to a person in this state, solicit a deposit to secure the account without first having obtained a license to conduct a banking business as required by [NRS 659.115](#)?

### ANALYSIS

[NRS 657.037](#) defines "depository institution" as:

[A]ny bank, savings and loan association, savings bank, thrift company, credit union or other institution, whether chartered by the state or Federal Government which:

1. Holds or receives deposits, savings or share accounts;
2. Issues certificates of deposit; or
3. Provides to its customers other depository accounts which are subject to withdrawal by check, drafts or other instruments or by electronic means to effect payment to a third party.

Except for nationally chartered banks with offices in this state, no corporation may solicit or accept deposits in this state without first receiving from the commissioner of financial institutions a license to transact the business of a bank. [NRS 659.115](#)(1). For purposes of the licensing law, the term "solicit deposits" is defined by [NRS 80.016](#). That statute, contained in the provisions

governing foreign corporations, describes the circumstances under which a solicitation for a deposit is made or accepted in this state.<sup>35</sup>

In the situation you have described a depository institution contacts a Nevada resident by telephone or through the mail soliciting a credit card account that must be secured by making a deposit in the institution making the solicitation. The institution does not solicit deposits except as security for its credit card accounts and is not licensed as a bank or other depository institution in this state.<sup>36</sup> Since the solicitation is directed to and received by persons in this state, it seems clear that the solicitation of the deposit is made in this state within the meaning of [NRS 80.016](#). [NRS 80.015](#) lists certain activities that will not constitute "doing business in this state." A corporation that is not doing business in this state under this statute is not required to qualify as a foreign corporation or comply with any of the provisions of chapter 645B of NRS or Titles 55 and 56 of NRS, including the bank licensing requirement of [NRS 659.115](#). [NRS 80.015\(3\)](#). The activities that will exempt a corporation from these provisions include:

- (g) Creating or acquiring indebtedness, mortgages and security interests in real or personal property;
- (h) Securing or collecting debts or enforcing mortgages and interests in property securing the debts . . . .

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<sup>35</sup> NRS 80.016 provides in full:

For the purposes of NRS 80.015:

1. A solicitation of a deposit is made in this state, whether or not either party is present in this state, if the solicitation:

(a) Originates in this state; or

(b) Is directed by the solicitor to a destination in this state and received where it is directed, or at a post office in this state if the solicitation is mailed.

2. A solicitation of a deposit is accepted in this state if acceptance:

(a) Is communicated to the solicitor in this state; and

(b) Has not previously been communicated to the solicitor, orally or in writing, outside this state.

Acceptance is communicated to the solicitor in this state, whether or not either party is present in this state, if the depositor directs it to the solicitor reasonably believing the solicitor to be in this state and it is received where it is directed, or at any post office in this state if the acceptance is mailed.

3. A solicitation made in a newspaper or other publication of general, regular and paid circulation is not made in this state if the publication:

(a) Is not published in this state; or

(b) Is published in this state but has had more than two-thirds of its circulation outside this state during the 12 months preceding the solicitation.

If a publication is published in editions, each edition is a separate publication except for material common to all editions.

4. A solicitation made in a radio or television program or other electronic communication received in this state which originates outside this state is not made in this state. A radio or television program or other electronic communication shall be deemed to have originated in this state if the broadcast studio or origin of the source of the transmission is located within the state, unless:

(a) The program or communication is syndicated and distributed from outside this state for distribution to the general public in this state;

(b) The program is supplied by a radio, television or other electronic network whose electronic signal originates outside this state for redistribution to the general public in his state;

(c) The program or communication is an electronic signal that originates outside this state and is captured for redistribution to the general public in this state by a community antenna or cable, radio, cable television or other electronic system; or

(d) The program or communication consists of an electronic signal which originates within this state, but which is not intended for redistribution to the general public in this state.

<sup>36</sup> You have indicated, however, that very often the soliciting institutions demands a larger deposit than would appear to be necessary to secure the credit card.

[NRS 80.015](#)(1). At first glance it would appear that, since the solicitation of a deposit in the situation you have described takes place in the context of a corporation creating indebtedness and securing a debt, the activity would not constitute doing business in this state and would be exempt from regulation by the Financial Institutions Division. This exemption from regulation does not apply, however, if the corporation:

- (a) Maintains an office in this state for the transaction of business; or
- (b) Solicits or accepts deposits in the state, except pursuant to [NRS 666.225](#)—.375, inclusive.

[NRS 80.015](#)(3). The provisions of [NRS 666.225](#)—.375, inclusive, authorize certain foreign institutions to acquire or merge with an institution chartered in this state or establish a branch office in certain counties in this state and are not pertinent to this analysis.

In Op. Nev. Att'y Gen. No. 92-3 (March 12, 1992), the Attorney General discussed the solicitation of deposits in connection with these exemptions:

By limiting the exemption from qualification and licensing requirements in [NRS 80.015](#) to those foreign corporations that do not solicit or accept deposits in this state, we believe the legislature intended to further one of the primary of laws governing the licensing and regulation of financial institutions—the protection of Nevada citizens from financial loss. That purpose is best served by construing the term "deposit" in [NRS 80.015](#)(3)(b) broadly to encompass any situation where a foreign corporation solicits money from Nevada residents in the manner described in [NRS 80.016](#).

The opinion attempts to reconcile the licensing requirements of chapters 645B and 675 with the exemption from licensing found in [NRS 80.015](#). Similarly, the question presented here also involves a licensing law and a statute that exempts certain activity from that law. Consistent with the reasoning of Op. Nev. Att'y Gen. No. 92-3 (March 12, 1992), we conclude that a foreign depository institution which solicits money from Nevada residents in connection with the establishment of a credit card account is conducting banking activity in this state subject to the licensing requirements of [NRS 659.115](#). Such activity is not exempted from the licensing law by [NRS 80.015](#).

#### CONCLUSION

A foreign depository institution which solicits money from Nevada residents in connection with the establishment of a credit card account, is soliciting deposits in this state within the meaning of [NRS 80.015](#)(3)(b) and 80.016, and therefore, is not exempt from the licensing law by [NRS 80.015](#). A depository institution as defined in [NRS 657.037](#) may not, in connection with its offer of a credit card account to a person in this state, solicit a deposit to secure the account without first having obtained a license to conduct a banking business as required by [NRS 659.115](#).

FRANKIE SUE DEL PAPA  
Attorney General

By: DOUGLAS E. WALTHER  
Senior Deputy Attorney General

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OPINION NO. 94-24 ETHICS; JUDGES; FINANCIAL DISCLOSURES: The separation of powers doctrine does not preclude the legislative branch from exercising its constitutional

authority over public elections by requiring *candidates* and *public and judicial officers* to file financial disclosure statements for the information of the general electorate.

Carson City, November 30, 1994

Thomas R.C. Wilson II, Chairperson, Nevada Commission on Ethics, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Wilson:

You have requested an opinion from our office regarding the following question:

#### QUESTION

Are the financial disclosure filing requirements for candidates for judicial office and elected judicial officers contained in [NRS 281.561](#)—.581 a constitutional exercise of legislative authority under the separation of powers doctrine?

#### ANALYSIS

##### I.

The separation of powers doctrine is the cornerstone of our republican form of state and federal governments. James Madison, a chief architect of the United States Constitution, relied on the analysis of the then premier authority on the separation of powers doctrine, Montesquieu, to explain the doctrine:

[I]n saying, "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *control over* the acts of each other. His meaning, as his own words import . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted . . . . The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department.

*The Federalist* No. 47, at 331-32 (James Madison) (emphasis in original).

The Nevada State Constitution, adopted in 1864, similarly provides for the distribution of powers between the legislative, executive and judicial branches in the following manner:

The powers of the Government of the State of Nevada shall be divided into three separate departments, — the Legislative, — the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted.

Nev. [Const. art. 3, 1](#).

Article 4 of the Nevada Constitution creates the legislative branch, Article 5 — the executive branch, and Article 6 — the judicial branch of Nevada government. In January 1967 the Supreme Court of Nevada considered the question of what constituted separation of legislative, executive and judicial powers under the Nevada Constitution in *Galloway v. Truesdell*, [83 Nev. 13](#), 422 P.2d 237 (1967). There the court described Nevada's tripartite governmental powers in the following manner:

[L]egislative power is the power of law-making representative bodies to frame and enact laws, and to amend or repeal them. This power is indeed very broad, and, except where limited by Federal or State Constitutional provisions, that power is practically absolute. Unless there are specific constitutional limitations to the contrary, statutes are to be construed in favor of legislative power . . . .

The executive power extends to the carrying out and enforcing the laws enacted by the legislature. Except where there is a constitutional mandate or limitation, the legislature may state which actions the executive shall or shall not perform.

"Judicial Power" is the capability or potential capacity to exercise a *judicial function*. That is, "Judicial Power" is the *authority* to hear and determine justiciable controversies . . .

*Galloway*, 83 Nev. at 20 (emphasis in original).

## II.

At question herein is statutory applicability of the language of [NRS 281.561](#)—.581 to judicial officers and candidates. [NRS 281.561](#) provides for filing of statements of financial disclosure by every *candidate for public or judicial office* with the Nevada Commission on Ethics (Commission) and with the officer with whom declarations for candidacy are filed within ten days after the last day to qualify as a candidate for office. [NRS 281.561](#)(1). Declarations of candidacy are filed with the city clerk, county clerk, or secretary of state, depending upon the state or local office for which election is sought. A candidate includes any person who files a declaration of candidacy or an acceptance of candidacy or "[w]hose name appears on an official ballot at any election, for election to any public office including the office of justice of the supreme court, district judge, justice of the peace and municipal judge." [NRS 281.4323](#).

Every *elected or appointed public or judicial officer* must also file a statement of financial disclosure with the Commission on or before the anniversary of their election or appointment to office. [NRS 281.561](#)(3). A public officer includes every person elected or appointed to a position created by the Constitution of Nevada, by its statutes or by ordinance of any of its counties or incorporated cities. [NRS 281.4365](#)(1). A judicial officer includes every judge "authorized, alone or with others, to hold and preside over a court of record." [NRS 208.045](#) and [193.106](#). The supreme court and district court are courts of record pursuant to Article 6, § 8 of the Constitution. Justice courts and in certain instances municipal courts are also courts of record pursuant to legislative declaration. [NRS 1.020](#)(3) and (4).

Willful failure to file a statement of financial disclosure is a misdemeanor. [NRS 281.581](#).

Statements of financial disclosure filed with the Commission on Ethics *and* the appropriate state or local candidacy filing office must contain the following information concerning the candidate or public or judicial officer:

(a) His length of residence in the State of Nevada and the district in which he is registered to vote.

(b) Each source of his income, or that of any member of his household. No listing of individual clients, customers or patients is required, but if that is the case, a general source such as "professional services" must be disclosed.

(c) A list of the specific location and particular use of any real estate, other than a personal residence:

(1) In which he or a member of his household has a legal or beneficial interest;

(2) Whose fair market value is \$2,500 or more; and

(3) Which is located in this state or any adjacent state.

(d) The name of each creditor to whom he or a member of his household owes \$5,000 or more, except for;

(1) A debt secured by a mortgage or deed of trust of real property which is not required to be listed under paragraph (c); and

(2) A debt for which a security interest in a motor vehicle for personal use was retained by the seller.

(e) A list of all gifts of \$200 or more which the public or judicial officer or candidate received during the preceding taxable year, except:

(1) A gift received from a person who is related to the public or judicial officer or candidate within the third degree of consanguinity or affinity.

(2) Ceremonial gifts received for a birthday, wedding, anniversary, holiday or other ceremonial occasion if the donor does not have a substantial interest in the legislative, administrative, judicial or political action of the public or judicial officer or candidate.

(f) A list of each business entity with which he or a member of his household is involved as a trustee, beneficiary of a trust, director, officer, owner in whole or in part, limited or general partner, or holder of any class of stock or security representing 1 percent or more of the total outstanding stock or securities issued by the business entity.

#### [NRS 281.571\(1\)](#).

Canon 4I(2) of the Nevada Code of Judicial Conduct *also* requires judges and candidates for judicial office to file statements of financial disclosure with the clerk of the supreme court.

Statements of financial disclosure required by the supreme court in Canon 4I(2) differ from the statements required of public and judicial candidates and officers by the legislature, under [NRS 281.561](#)—.581, in the following respects:

1. Canon 4I(2)(b) requires that the statements be filed only with the clerk of the court while [NRS 281.561](#) requires they be filed with the Commission on Ethics Office *and* with the city, county or state office where one's declaration of candidacy is appropriately filed;

2. Canon 4I(2)(b)(iii) directs that financial disclosure statements for elected judges are due annually with the supreme court on April 30, while the annual filing deadline under [NRS 281.561\(3\)](#) is the anniversary of election or appointment;

3. Willful failure to file a statement of financial disclosure is a misdemeanor under the provisions of [NRS 281.581](#), while the consequences for failure to file a statement of financial disclosure by a candidate or judicial officer under the provision of Canon 4I(2)(b) are not specific. The Preamble to the Nevada Code of Judicial Conduct provides:

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. It is not designed or intended as a basis for civil liability or criminal prosecution . . . .

The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline

to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

Part VI, Preamble, Nevada Code of Judicial Conduct.

4. Canon 4I(2) requires reporting of gifts, bequests, favors or loans if value exceeds \$150; [NRS 281.571](#)(1) requires reporting of the same if value exceeds \$200.

On April 6, 1994, the Supreme Court of Nevada, by and through the office of the clerk wrote to the Nevada Commission on Ethics and requested the Commission direct any judge or candidate for judicial office who attempted to file a statement of financial disclosure with the Commission that such report is properly filed with the supreme court. On the same day, April 6, 1994, the office of the clerk issued a memorandum to all Nevada district court and municipal court judges and to all justices of the peace regarding financial disclosure reports. The memorandum provided the following:

It has come to my attention that some confusion exists with regard to the filing of financial disclosure statements by judicial officers. This memorandum is intended to clarify the filing requirements.

Canon 4I(2)(b) of the Nevada Code of Judicial Conduct (NCJC) provides that all judicial disclosure statements must be "filed as a public document in the office of the Clerk of the supreme court . . . ." The NCJC sets forth the *only* financial disclosure provisions that govern judges. *See* Canon 4J (disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this Canon and in Sections 3E and [NRS 281.581](#) do *not* apply to the judicial branch of government). *See* Canon 5F and the Commentary to Canon 5F.

It appears that a number of judges have erroneously complied with the statutory provisions of [NRS 281](#), rather than those of the NCJC. Thus, some judicial financial disclosure statements are not on file with this court, but are instead on file with the Ethics Commission or the Secretary of State. Some may even have been filed with the local County or City Clerk.

If you have not filed your financial disclosure statements in this court, please send a copy of your financial disclosure statement to this office, along with a short letter explaining that you erroneously filed your statement with the Ethics Commission, Secretary of State or County or City Clerk, and wish to correct the error.

Enclosed is a form financial disclosure statement prepared by this office. You may use this form for all future filings. The deadline for your statements is April 30. Because April 30 falls on a Saturday this year, your 1993 statement will be timely if received in this office on Monday, May 2, 1994.

Canon 5F provides: "In the event of conflict between the provisions of this Code and any statutes covering the same subject matter, activities or reports, the terms of this Code shall prevail."

The Commentary to Canon 5F provides in part the following:

Section F specifically applies to A.B. 190, amending [NRS Chapter 281](#) as it applies to ethics in government, which amendments shall have no application to the judicial branch of government, and S.B. 166 §§ 2, 3 and 4, amending [NRS 294A](#), which shall also have no application to the judiciary. This provision of the Code recognizes and reaffirms the principles provided by the Nevada Constitution (art. 3, § and 1) and various case decisions .

. . .

The Commentary to Canon 5F directly conflicts with the financial disclosure requirements of [NRS 281.561](#) and with [NRS 2.120\(1\)](#) which specifically provides the following:

The supreme court may make rules not inconsistent with the constitution and laws of the state for its own government, the government of the district courts, and the government of the State Bar of Nevada. Such rules shall be published promptly upon adoption and take effect on a date specified by the supreme court which in no event shall be less than 30 days after entry of an order adopting such rules.

The Preamble to the Nevada Code of Judicial Conduct describes the Canons as "rules of reason" which "should be applied consistent with constitutional requirements, other court rules and decisional law and in context of all relevant circumstances." Part VI, Preamble, Nevada Code of Judicial Conduct. The Preamble and Commentaries to the Canons do not have the force and effect of statutory, constitutional or common law. Canons themselves are mandatory court rules which cannot be inconsistent with the laws of Nevada.

Nonetheless, the conflicting directives of [NRS 281.561](#) and Canons 4I and 5F, with respect to obligatory financial disclosure filing requirements for judicial candidates and officers, understandably create a legal dilemma for both candidates and officers in the judicial branch of Nevada government and for the Commission's duty to comply with its responsibilities under the Ethics in Government Law. Your question is therefore most appropriate in attempting to resolve these dilemmas.

### III.

The constitutionality of Nevada statutes is presumed absent clear evidence of unconstitutionality. *Allen v. Nevada*, [100 Nev. 130](#), 133-34, 676 P.2d 792, 794 (1984). Unless a *specific constitutional limitation* exists to prohibit legislative enactment, questions of constitutionality must be answered in favor of legislative power. *Galloway*, 83 Nev. at 20.

The question is, therefore, whether the Nevada Legislature is excluded by a specific constitutional limitation from requiring candidates for judicial office and elected judicial officers to file statements of financial disclosure with the Nevada Commission on Ethics and with the state or local officer with whom declarations of candidacy are filed. Or, the question in the converse is whether the Nevada Supreme Court has exclusive authority under the Nevada Constitution to dictate whether, where, and in what form candidates for judicial office and elected judicial officers must file statements of financial disclosure.

As stated in the Commentary to Canon 5F and referred to above, the Nevada Supreme Court has authority to administer its own affairs. *Sun Realty v. District Court*, [91 Nev. 774](#), 542 P.2d 1072 (1975). Neither the legislative nor executive branches of Nevada government may encroach upon the powers of the judicial branch. *Graves v. State*, [82 Nev. 137](#), 313 P.2d 503 (1966).

The separation of powers doctrine, however, does not require "three airtight departments of government." *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). In *Nixon*, the United States Supreme Court held that:

In determining whether the Act [of Congress] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the [affected branch] from accomplishing its constitutionally assigned functions . . . . Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

*Nixon*, 433 U.S. at 443.

The Nevada Supreme Court Commentary to Canon 5F of the Nevada Code of Judicial Conduct does not specifically articulate how statutory financial disclosure filing requirements at [NRS 281.561](#)—581 prevent the supreme court from accomplishing its constitutionally assigned functions. The Commentary states that such responsibilities are within the inherent power of the court to protect itself and administer its own affairs. Acknowledging those judicial responsibilities and further acknowledging that perhaps the dual legislative and judicial financial disclosure filing requirements for judicial candidates and officers may, somehow indeterminably, interfere with the court's accomplishing its constitutionally assigned functions, the question is whether, under the United States Supreme Court test articulated in *Nixon*, such impact is justified by an overriding need to promote objectives within the constitutional authority of the Nevada legislative branch of government. *See Nixon*, 433 U.S. at 443.

The Nevada State Legislature has exclusive authority over public elections of all officials, including judicial officers in the state. At no time in the history of Nevada jurisprudence has the validity of the legislative regulation of the election process been challenged because the election regulations violate the separation of powers doctrine. The Nevada Constitution expressly provides that justices of the supreme court (art. 6, § 3), district judges (art. 6, § 5), justices of the peace (art. 6, § 8), and municipal court judges (art. 6, § 9) are all *elected* officials. Since the judiciary is elected by qualified electors of the state in the general elections, it is subject to the election laws enacted by the Nevada Legislature. The Nevada Constitution *does not* provide any specific or different election procedures for election of judicial officers. Article 6, §§ 3 and 5 of the Nevada Constitution establish certain requirements as to timing of various elections for supreme and district court judges, but the actual mechanics of election are left to the legislature. Article 6, §§ 8 and 9 expressly contemplate that the legislature will create election standards, as well as other standards of qualification and need for justices of the peace and municipal judges.

In implementing the constitutional dictates of article 6 of the Nevada Constitution, the Nevada Legislature has made numerous laws that apply to and directly affect the supreme court and the judiciary. [NRS 2.020](#) dictates the qualifications for a candidate for supreme court justice, [NRS 2.030](#) specifies timing of elections of supreme court justices, and [NRS 293.195](#) directs that election of supreme court justices be nonpartisan. [NRS 3.060](#) identifies the qualifications for a candidate to the supreme court, [NRS 3.080](#) supplies rules for filling vacancies, and [NRS 293.105](#) makes election of district judges nonpartisan.

With respect to justices of the peace, [NRS 4.010](#) establishes qualifications for a justice of the peace; [NRS 4.020](#) establishes rules for determining the number and manner of holding elections for justices of the peace; [NRS 4.025](#) sets terms of office for justices of the peace; [NRS 4.150](#) establishes rules filling vacancies; and [NRS 293.105](#) makes election of justices of the peace nonpartisan.

[NRS 5.020](#) establishes rules for election of municipal judges and [NRS 293.105](#) makes election of municipal judges nonpartisan.

[NRS 293.177\(2\)\(b\)](#) requires each candidate for judicial office to swear, among other things, "that I will not knowingly violate any election law or any law defining and prohibiting corrupt and fraudulent practices in campaigns and elections in this state . . . ." on a form declaration of candidacy for nonpartisan offices.

The statutes in question, [NRS 281.561](#)—581, impose certain requirements on *all* candidates or holders of public office in Nevada. Pursuant to the provisions of [NRS 281.561](#), *any* candidate for *any* public office in Nevada, *including judicial office*, must make certain financial disclosures, and

once elected, must continue to make certain financial disclosures under pain of criminal sanctions. ([NRS 281.581](#)).

[NRS 281.561](#) is but one of many laws that regulate the candidacy and election of judicial officers. The duties of judicial officers and the inherent authority of the supreme court of Nevada do not automatically exclude the judiciary from complying with the civil and criminal laws of the state imposed on *every* citizen and the uniform election laws applicable to *every* candidate and elected officer. As long as such laws do not prevent the judiciary from carrying out its traditional duties, the legislature may require compliance with the state laws of Nevada. See *United States v. Nixon*, 418 U.S. 683 (1974).

In considering this issue at the federal level, the United States Court of Appeals for the Fifth Circuit determined that the Federal Ethics in Government Act of 1978 (Act) Pub. L. No. 95-521, §§ 301-09, 92 Stat. 1824, 1851-62 (1978); subsequently repealed and replaced by Ethics Reform Act of 1989, also requiring federal judiciary to file personal financial disclosure statements, Pub. L. No. 101-194, Title II, §§ 210 and, 202, 103 Stat. 1725 (1989), codified as re-enacted and amended at 5 U.S.C. app. § 101, *et seq.* (1994)), requiring the federal judiciary to file personal statements of financial disclosure, was not a violation of the doctrine of separation of powers. *Duplanter v. United States*, 606 F.2d 654, 668 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981). The Act required federal judges to file statements with the Judicial Ethics Committee (created pursuant to the provisions of the Act), and with the clerks of their respective courts; such documents were available for public inspection and reproduction. Pub. L. No. 95-521, § 303, 92 Stat. at 1858. The Attorney General of the United States was authorized to bring civil actions against federal judges who violated the federal requirements. Willful violation of the Act carried penalties of \$5000 and the penalty for negligent violation was \$1000. Pub. L. No. 95-521, § 302, 92 Stat. at 1857.

Six federal judges filed a class action lawsuit challenging the Act on several grounds, including the ground that it violated the constitutional doctrine of separation of powers. The Court held that "the intrusion upon the constitutionally assigned functions of the judiciary made by the Act is justified by the promotion of important objectives within the constitutional authority of Congress." *Duplanter*, 606 F.2d at 668. The Court specifically listed those objectives in its opinion:

Congress sought by the Act to increase public confidence in all three branches of the federal government, demonstrate the high level of integrity of the vast majority of government officials, deter conflicts of interest from arising, deter some persons who should not be entering public service from doing so, and better enable the public to judge the performance of public officials. *Id.*

The Court found these objectives appropriately applicable to the judiciary even though in the federal system, judges are appointed while officials from the other two branches of government are elected. *Id.* Since *Duplanter*, the validity of statutes requiring judges to file financial disclosure statements has remained solid, with only one case excluding applicability of such legislation to judges, and no cases finding such legislation entirely unconstitutional.

In that case, *Kremer v. State Ethics Commission*, 469 A.2d 593, 595 (Pa. 1983), the Pennsylvania state supreme court held unconstitutional state law requiring judges, in addition to other public officers and employees, to comply with statutory financial disclosure requirements. The Pennsylvania court did not consider the question of judicial candidate filing requirements.

In Nevada, where judges are both elected and appointed to fill vacant positions (Nev. [Const. art. 6, § 20](#)), the legislature articulated public confidence and uniformity in application of state law disclosure requirements as important objectives in making applicable the financial disclosure requirements of [NRS 281.561](#)—.581 to all three branches of state government. (Minutes of March 14, 1991, hearing on A.B. 190 before the Assembly Committee on Legislative Functions and

Elections at 102.) The Nevada Legislature, similar to the Fifth Circuit Court in *Duplanter*, has determined that there is no reasonable basis to treat judges differently than other elected and appointed state officials who face criminal sanctions if they fail to follow the financial disclosure requirements of [NRS 281.561](#)—.581.

Nevada case law does not provide a clear answer on the question presented. In 1976, the Nevada Supreme Court considered the then ethics in government law which was challenged as unconstitutionally vague by public officers required to file financial disclosure statements. The court agreed with the plaintiffs and declared the law unconstitutional in its entirety. *Dunphy v. Sheehan*, [92 Nev. 259](#), 267, 549 P.2d 332, 377 (1976). In *dicta* in that case, the court stated that the legislature specifically excluded members of the judiciary from the Ethics in Government Law and that such exclusion was constitutionally mandated. *Dunphy*, [92 Nev.](#) at 265. The court did not comment in that case on the propriety of *candidates* for judicial office being subjected to the financial disclosure requirements.

The Nevada Supreme Court has not had the opportunity to consider a case involving the new ethics statute in relation to the question presented. As with the earlier version, the current ethics statute *excludes* judicial officers from the definition of public officers and employees, to which the Code of Ethical Standards at [NRS 281.481](#)—.557 is made applicable. However, such judicial exclusion is not carried over, and in fact is *specifically included* in the financial disclosure sections of chapter 281 at [NRS 281.561](#)—.581.

In light of the presumption of constitutionality of Nevada statutes, the broad power of the legislature to frame and enact laws unless specifically limited by the constitution, the absence of specific constitutional restraint in this area and the presence of legitimate legislative objectives in pursuing public financial disclosure statements from candidates and elected officials in Nevada, there is a sufficient basis to conclude that [NRS 281.561](#)—.581 is a constitutional exercise of legislative authority. In the absence of case law, in Nevada or elsewhere, directing a contrary finding with respect to candidates for judicial office, and in light of the Fifth Circuit Court of Appeals ruling which resoundingly supports the constitutionality of similar legislation for the sitting federal judiciary, we conclude that the Nevada statutory scheme is constitutional.

### CONCLUSION

The separation of powers doctrine does not preclude the legislative branch from exercising its constitutional authority over public elections by requiring *candidates* and *public and judicial officers* to file financial disclosure statements for the information of the general electorate.

FRANKIE SUE DEL PAPA  
Attorney General

By: FRANCES DOHERTY  
Deputy Attorney General

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OPINION NO. 94-25 LABOR: Pay is due an employee working under a collective bargaining agreement according to the timing rules in the agreement, and an employer would only be liable for payment of penalties to the employee under [NRS 608.050](#)(1) if the employer did not timely make payment of wages according to the agreement.

Carson City, December 31, 1994

Ms. Rose McKinney-James, Director, Department of Business and Industry,  
Springs Road, Carson City, Nevada 89710

1665 Hot

Dear Ms. McKinney-James:

You have asked how [NRS 608.040](#) and [608.050](#) apply to employees who set up and tear down convention displays where their work is performed only on an as-needed basis under the terms of a collective bargaining agreement. You have also asked whether, and if so how, the decision of the United States Supreme Court in *Livadas v. Bradshaw*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 2068 (1994) would apply to the same employees. The analyses of these two questions follow.

### QUESTION ONE

How do [NRS 608.040](#) and [608.050](#) apply to employees who work for an employer on an as-needed basis under terms of a collective bargaining agreement?

### ANALYSIS

The facts underlying your question, as you have presented them to this office, are that Teamsters Local #631 has collective bargaining agreements (CBAs) with several local "exhibitors," companies that provide equipment and labor to set up and tear down exhibition displays at convention facilities in Las Vegas. The employees work on an as-needed basis, meaning that they are called to work when a signatory exhibitor needs their services, they perform the work, and when their services are no longer needed (usually after a convention has been torn down) are laid off until the next time they are needed. When the employees are laid off, they are paid their final paycheck in accordance with the terms of the CBA. Depending on the circumstances and the CBA, the final payment could be made to the employees anywhere from the day after they are laid off to as many as 12 days later.

Some of the employees have asserted to the Labor Commissioner that they must be paid within three days after they have been laid off, claiming [NRS 608.040](#)(1)(a) as authority. The Labor Commissioner has responded: (1) his interpretation of [NRS 608.040](#) and [608.050](#) is that the employees must be paid in accordance with the timing in their CBAs; (2) if they are paid in accordance with their CBAs, they have no entitlement to penalties; and (3) because the employees are members of labor unions that can afford counsel, the Labor Commissioner will decline to represent the employees.

[NRS 608.040](#)(1) provides:

1. If an employer fails to pay:

(a) Within 3 days after the wages or compensation of a discharged employee becomes due; or

(b) On the day the wages or compensation is due to an employee who resigns or quits, the wages or compensation of the employee continues at the same rate from the day he resigned, quit or was discharged until paid or for 30 days, whichever is less.

[NRS 608.050](#)(1) provides:

Whenever an employer of labor shall discharge or lay off his or its employees without first paying them the amount of any wages or salary then due them, in cash and lawful money of the United States, or its equivalent, or shall fail, or refuse on demand, to pay them in like money, or its equivalent, the amount of any wages or salary at the time the same becomes due and owing to them under their contract of employment, whether employed by the hour, day, week or month, each of his or its employees may charge and

collect wages in the sum agreed upon in the contract of employment for each day his employer is in default, until he is paid in full, without rendering any service therefor; but he shall cease to draw such wages or salary 30 days after such default.

[NRS 608.040](#)(1) and [608.050](#)(1) appear similar, but they must be construed as two separate acts with two distinct purposes. *Doolittle v. District Court*, [54 Nev. 319](#), 322, 15 P.2d 684, 685 (1932). The *Doolittle* case is telling because it was rendered in 1932, just seven years after [NRS 608.050](#) was passed, and because the interrelationship of [NRS 608.040](#) and [608.050](#) was explicitly discussed. The Nevada Supreme Court discussed the predecessors of [NRS 608.040](#) and [608.050](#) as follows:

The 1925 act [now [NRS 608.050](#)] does not purport to be amendatory of the other acts or to repeal any portion of them. It is clearly an independent act intended to meet an entirely different situation than that contemplated by the act of 1919 [now [NRS 608.040](#)].

3. Counsel urges that the act of 1925 works great hardships. We cannot see that it does. When a person employs another, if he is honest, he expects to pay for the service, and should be ready to do so upon the completion of the work, *or have an understanding to the contrary before the employment is entered into*. The statute itself contemplates payment when the same becomes due *under the contract of employment*. . . . [Emphasis supplied.]

*Doolittle*, at 322. To give effect to the Supreme Court's pronouncement that [NRS 608.040](#) and [NRS 608.050](#) are "intended to meet . . . entirely different situation[s]" requires some delving into the language and structure of both statutes.

[NRS 608.040](#) must first be read in conjunction with [NRS 608.020](#) and [608.030](#), since all three statutes were passed together in 1919. These three statutes, read together, create a set of general rules regarding timing of payment of wages when employment ceases and when a penalty can be imposed if those general rules are breached. The general timing rules simply state:

(1) If an employee is fired, his wages become immediately due and payable ([NRS 608.020](#)), but no penalty will be imposed upon an employer so long as he pays the wages due within three days after the firing ([NRS 608.040](#)(1)(a)); and

(2) If an employee resigns or quits, his wages become due and payable at the earlier of either seven days after he quits ([NRS 608.030](#)(2)) or on his regular pay day ([NRS 608.030](#)(1)), and the penalty will be imposed upon the employer should he fail to timely pay the wages according to the applicable payment date.

As this structure shows, an employee should generally be paid no later than three days after he is fired or seven days after he quits.

[NRS 608.050](#)(1), created six years later in 1925, adds two conditions to the general rules established in [NRS 608.020](#)—[.040](#) relating to those employees who are discharged or laid off. The first condition is that an employer must pay its employees' wages "in cash and lawful money of the United States, or its equivalent." This first condition does not address timing of payment, but instead addresses the acceptable forms of payment. The second condition is that an employer shall not fail or refuse to pay wages "at the time the same becomes due and owing to them under their contract of employment."

The second condition addresses those employees for whom timing payment is controlled by a contract of employment.<sup>37</sup> In *Doolittle*, the Supreme Court acknowledged that the effect of the

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<sup>37</sup> NRS 608.060(2) authorizes employers and employees to enter into contracts to allow for the timing of payment more frequently than the general rule (found in NRS 608.060(1)) of payment on the fifteenth and last days of each month.

second condition was to allow the parties to control timing of payment of wages according to the terms of a contract of employment entered into "before the employment is entered into." *Doolittle*, at 322.

The question raised in this opinion, then, is answered by reference to the workings and language of [NRS 608.040](#) and [608.050](#). The employees in this opinion would be subject to the timing provisions in [NRS 608.050\(1\)](#) and could not avail themselves of the timing provisions in [NRS 608.040\(1\)\(a\)](#) for two reasons. First, [NRS 608.050\(1\)](#) specifically refers to employees who are "laid off," whereas [NRS 608.040\(1\)\(a\)](#) specifically refers only to employees who are "discharged." In this case, the employees were laid off since the terms of their working arrangement contemplates that they will be hired when there is work, and thus they have an expectation of future employment, whereas discharged employees have been permanently terminated by the employer, with no expectation of future employment. Thus, by its own specific language, [NRS 608.050\(1\)](#) applies to these employees and [NRS 608.040\(1\)\(a\)](#) cannot. Second, employment of the employees in this opinion is governed by a contract of employment, their CBAs with the exhibitors, and therefore, timing of payment of their wages is governed by the contract of employment and is squarely within the above-discussed second condition contained in [NRS 608.050\(1\)](#).

Thus, the employees in this opinion are governed by the payment timing rules in [NRS 608.050\(1\)](#) and are, therefore, bound by the payment timing rules contained in the CBAs with their employers. The employees' employer would, therefore, only be liable for penalties under [NRS 608.050\(1\)](#) if it failed to pay the wages in accord with the timing rules contained in the CBA.

#### CONCLUSION TO QUESTION ONE

[NRS 608.050\(1\)](#) applies to employees who work on an as-needed basis under the terms of a collective bargaining agreement, and an employer under such an agreement is only liable for payment of penalties under [NRS 608.050\(1\)](#) if the employer does not pay final wages to its employees whom it laid off within the time limits set in the agreement.

#### QUESTION TWO

Does the holding in *Livadas v. Bradshaw*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 2068 (1994) apply to the employees in this opinion, and if so, how?

#### ANALYSIS

You have asked whether *Livadas v. Bradshaw*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 2068 (1994) would have any application to the employees in this opinion. The brief answer to your question is that the *Livadas* opinion has only limited applicability to these employees, as the following analysis will show.

In *Livadas*, Ms. Livadas was terminated by Safeway. Safeway paid her according to its internal policies, which resulted in her receiving her payment three days later than California law allowed. Ms. Livadas filed a wage claim with the California Labor Commissioner for three days' penalty pay. The California Labor Commissioner sent her a form letter informing her that it could not and would not take cognizance of her wage claim because she was a member of a labor union and resolution of her wage claim would require the Labor Commissioner to refer to and interpret the CBA, an activity explicitly prohibited by California statute.

The Supreme Court held that the California Labor Commissioner could not refuse to take cognizance of Ms. Livadas' wage claim. The Court explained that the Labor Commissioner would need to make only a passing reference to the collective bargaining to determine Ms. Livadas' rate

of pay, but that the remainder of the Labor Commissioner's analysis would be the same for Ms. Livadas as it would be for employees not represented by a labor union. Because the Labor Commissioner's reference to the CBA would be minimal, the preemptive effect of the Labor-Management Relations Act (LMRA) was not invoked. The Court found, though, that Ms. Livadas' right to collectively bargain protected in the LMRA was impinged by the Labor Commissioner's policy.

Though the above analysis of the *Livadas* case is brief, it does show that the case has only limited applicability to the present question. It is not the policy of the Labor Commissioner's office to deny every wage claim filed by employees who are members of a labor union. Rather, the Labor Commissioner routinely *does* take cognizance of claims from union members as long as the claims do not require the analysis and interpretation of a CBA. Thus, the *Livadas* case is applicable only in that it is instructive to the Nevada Labor Commissioner that he ought not to refuse a wage claim simply because the employee is a union member. Instead, the Nevada Labor Commissioner ought initially to review a wage claim by an employee who is a union member to determine whether the claim is cognizable, that is, whether the claim requires analysis or interpretation of a CBA. As long as the wage claim does not carry the Labor Commissioner into an area preempted by the LMRA, the Labor Commissioner ought to process it the same as a claim made by any other employee.<sup>38</sup>

As a final matter, just because the Labor Commissioner could take cognizance of these employees' claims does not mean that he must. Under [NRS 607.160\(2\)](#), the Labor Commissioner may still inquire whether a given employee has the financial means to maintain his or her own action, and the employee's union representation can be considered as a factor in this inquiry. Additionally, even if the Labor Commissioner accepts a wage claim from a union member, he must process the claim the same as he would any other employee's claim, and a union member cannot control the Labor Commissioner's discretion any more than could any other employee filing a wage claim.

### CONCLUSION TO QUESTION TWO

The *Livadas* decision would require the Labor Commissioner to take cognizance over the wage claims of the employees in this opinion as long as the wage claim would require only minimal or no reference to a collective bargaining agreement to resolve the claim. If the claim required interpretation and analysis of a collective bargaining agreement, then the Labor Commissioner could not take cognizance of the claim because he would be preempted by the LMRA.

FRANKIE SUE DEL PAPA  
Attorney General

By: LOUIS LING  
Deputy Attorney General

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<sup>38</sup> To determine where the boundaries of LMRA preemption are in a given case, the Labor Commissioner should refer to his deputy attorney general on a case-by-case basis.